

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 v.) No. 4:13-CR-221-CDP
)
 ROBERT WASHINGTON,)
 DARYL WARREN,)
)
 Defendants.)

PRETRIAL CONFERENCE

BEFORE THE HONORABLE CATHERINE D. PERRY
UNITED STATES DISTRICT JUDGE

MARCH 3, 2014

APPEARANCES:

For Plaintiff: Cristian M. Stevens, AUSA
Allison H. Behrens, AUSA
OFFICE OF U.S. ATTORNEY

For Defendant John M. Lynch, Esq.
Robert Washington Tania Aldaddah, Esq.
LAW OFFICES OF JOHN M. LYNCH, LLC

For Defendant Herman L. Jimerson, Esq.
Daryl Warren **JIMERSON LAW FIRM**

REPORTED BY: Gayle D. Madden, CSR, RDR, CRR
Official Court Reporter
United States District Court
111 South Tenth Street, Third Floor
St. Louis, MO 63102
(314) 244-7987

1 (Proceedings began at 8:39 a.m.)

2 (The following proceedings were held in open court and
3 with the Defendants present.)

4 (The following proceedings were held outside the hearing
5 and presence of the jury panel.)

6 THE COURT: We are here in the case of United States
7 of America versus Robert Washington and Daryl Warren, and I
8 see Mr. Lynch and Ms. Aldaddah --

9 MS. ALDADDAH: Yes.

10 THE COURT: -- with Mr. Washington and then
11 Mr. Jimerson with Mr. Warren, and I also see that we've
12 rearranged the courtroom tables, and so this -- this looks
13 likes it's acceptable to you all and to the Marshals Service.
14 Okay.

15 MR. JIMERSON: Yes, ma'am.

16 THE COURT: Yes.

17 MR. JIMERSON: Later on, Judge, we might try to add
18 another monitor here, so we can both view all the -- any
19 exhibits as well.

20 THE COURT: Okay. And I don't know how many exhibits
21 the -- now, I'll tell you, Mr. Jimerson, one thing; although
22 that's not very close, from where you're sitting, you can
23 probably see them on the screen at the -- at the lectern, and
24 so you all might adjust that in the meantime --

25 MR. JIMERSON: Yes, ma'am.

1 THE COURT: -- to try to make it a little easier.

2 MR. JIMERSON: Yes, ma'am.

3 THE COURT: Okay. And then Mr. Stevens and
4 Ms. Behrens. We have a number of items to discuss in the
5 pretrial, and there's a number of motions and other things
6 that have been filed. The first thing I wanted to ask
7 everyone, though -- I do not believe -- I do not recall and I
8 don't see any evidence of it in the court file -- that we've
9 ever made any record of any plea offers that were made to
10 these Defendants, and so, Mr. Stevens, if you wouldn't mind
11 standing up at the lectern and just stating for the record
12 what, if any, concessions were offered, what and when of any
13 concessions were offered, and then I'll ask defense counsel if
14 you agree this is what was offered and then if you
15 communicated that to your clients, and then I'll ask each
16 client the same thing.

17 MR. STEVENS: Thank you, Judge. Last June, shortly
18 after this case was indicted, I sent to Mr. Lynch a proposed
19 Plea Agreement regarding Mr. Washington. We had various
20 conversations about that and some negotiations. It's my
21 understanding that Mr. Washington rejected our offer, but
22 my -- my offer, essentially, was Mr. Washington is charged in
23 five counts in this case -- two counts of distribution of
24 cocaine, one count of conspiracy to possess with intent to
25 distribute cocaine, one count of possession of a firearm in

1 furtherance of a drug trafficking crime, and felon in
2 possession of a firearm as well. I offered a plea to Counts
3 II, III, and IV of the indictment, which would be,
4 essentially, a 15-year mandatory minimum. Mr. Lynch and I had
5 some discussions about agreeing possibly to a lower amount of
6 cocaine that would get Mr. Washington to the 15-year mandatory
7 minimum, and that, effectively, would have been the agreed
8 upon sentence between the parties.

9 THE COURT: All right. And, Mr. Lynch, is that a
10 correct summary of -- of what was -- what was offered?

11 MR. LYNCH: Yes, Your Honor. And for the record, I
12 would just put to the Court that I have met with Mr. Stevens
13 as a representative of the Government on a number of occasions
14 where we've gone through the Plea Agreement. I've asked for
15 concessions. I believe the Government made certain
16 concessions, but my client has rejected all of those.

17 THE COURT: Okay. And I guess there was some -- at
18 some point, this offer expired, right, Mr. Stevens?

19 MR. STEVENS: That's correct, Judge. On --

20 THE COURT: In any event, it's expired?

21 MR. STEVENS: I believe it was February 6th. It was
22 the week of February 3rd I asked for any response if they
23 intended to accept the Plea Agreements. I did not receive a
24 response that following week. I believe that following Monday
25 I talked with defense counsel. They confirmed that their

1 clients were rejecting that offer. That was approximately
2 three weeks ago.

3 THE COURT: Okay. So, Mr. Washington, I just want to
4 ask you this. Did -- and I'm not asking for any discussions,
5 but did your attorney communicate to you that this was what
6 the Government was offering you if you chose to plead guilty?

7 DEFENDANT WASHINGTON: Yes, ma'am.

8 THE COURT: And did you choose to reject that?

9 DEFENDANT WASHINGTON: Yes, ma'am.

10 THE COURT: Okay. And then I'll ask the same thing
11 for Mr. Warren.

12 MR. STEVENS: Yes, Judge. Again, at approximately
13 the same time, I sent a plea agreement to Mr. Warren's
14 attorney. I believe at that time he had a different lawyer
15 initially. Mr. Jimerson entered shortly after that, and it's
16 my understanding that that same Plea Agreement made it to
17 Mr. Jimerson. Mr. Warren is charged in three counts --
18 conspiracy to possess with intent to distribute cocaine,
19 possession of a firearm in furtherance of a drug trafficking
20 crime, and being a felon in possession of a firearm. I sent
21 an offer over offering to dismiss Count V of the indictment
22 and Mr. Warren would plead guilty to Counts III and IV, the
23 conspiracy and the 924(c) count. We had -- Mr. Jimerson and I
24 have had some discussions, although Mr. Jimerson has made
25 clear for quite some time that he didn't think his client

1 intended to accept the Plea Agreement, and again, the week of
2 February 3rd, I asked Mr. Jimerson to confirm or deny whether
3 his client would accept the Plea Agreement, and we
4 subsequently talked, and it's my understanding that Mr. Warren
5 has rejected the Plea Agreement. Mr. Jimerson continued to
6 contact me as late as, I believe, last Friday and confirmed
7 that he did not believe his client would plead guilty in this
8 case.

9 THE COURT: And let me just -- what would be the
10 effect or do you know what the -- you know, did you have an
11 estimate of what the sentence would be if -- if he -- if he
12 accepted that Plea Agreement?

13 MR. STEVENS: Judge, again, there would be a 15-year
14 mandatory minimum. Considering the amount of cocaine alleged
15 in the indictment, the Guideline sentence would be
16 substantially above that. Although Mr. Jimerson and I have
17 had conversations about potentially getting that lower, those
18 did not proceed because, apparently, Mr. Warren was not
19 interested in a plea in this case. I would also point out,
20 Judge, based on this -- this Defendant's, Mr. Warren's prior
21 convictions, he has five qualifying prior drug convictions
22 that would permit an enhancement pursuant to § 851(a), and
23 Mr. Jimerson and I discussed that, but my office -- in
24 reviewing the case, we've determined that we would not file
25 those enhancements in any event despite that Mr. Warren is

1 enhanceable to life in prison.

2 THE COURT: Are you saying you won't file them even
3 if he goes to trial and is convicted?

4 MR. STEVENS: That's correct, Judge.

5 THE COURT: Okay. So, basically, it would have been
6 the Government was contemplating or at least at some point it
7 could have gone to a 15-year but not below the 15 years?

8 MR. STEVENS: That's correct, Judge.

9 THE COURT: Okay. So the Government was never
10 offering anything below the 15-year mandatory minimum?

11 MR. STEVENS: That's correct, Your Honor.

12 THE COURT: Okay. Mr. Jimerson, has -- has counsel
13 correctly summarized the Plea Agreements?

14 MR. JIMERSON: Yes, ma'am, Mr. Stevens has. In fact,
15 we've had a few conversations as well. I conveyed both offers
16 in terms of that in my earlier seeing Mr. Warren as well as as
17 late as -- I believe it was Thursday or Friday when I spoke
18 with you. So he has not -- Mr. Warren has rejected all those
19 types of offers to plead guilty, Your Honor.

20 THE COURT: Okay. And so, Mr. Warren, let me ask you
21 the same thing. Did your -- that I asked your Codefendant.
22 Did your lawyer convey to you that the -- or tell you that the
23 Government was making concessions that could result in a
24 sentence of not lower than 15 years?

25 DEFENDANT WARREN: Yes, ma'am.

1 THE COURT: And did you reject those Plea Agreements?

2 DEFENDANT WARREN: Yes, ma'am.

3 THE COURT: And you chose to go to trial?

4 DEFENDANT WARREN: Yes, ma'am.

5 THE COURT: Okay. Thank you.

6 All right. Now let's talk about the -- what we're
7 going to do at this trial. I think -- did you all have some
8 *Old Chief* stipulations?

9 MR. STEVENS: Yes, Judge. I filed those suggested
10 stipulations several weeks ago. This morning, Mr. Washington
11 has signed that. I have that here, and I will mark that as an
12 exhibit for trial. I've also, again, presented a paper copy
13 this morning to Mr. Warren and his attorney. He has rejected
14 the opportunity to sign that, that stipulation.

15 THE COURT: Okay. So what do you intend to do --
16 well, I -- let's -- then let's take up, first, Mr. Warren's
17 prior convictions, and there are several motions that would be
18 directed to those because at this point you'll have to prove
19 up a felony to prove Count V, right?

20 MR. STEVENS: That's right, Your Honor.

21 THE COURT: So -- so hold on. Let me find the right
22 motions and responses.

23 MR. JIMERSON: Your Honor, may we have one moment?

24 THE COURT: Yeah, you may. You want to turn on the
25 white noise just to . . .

1 (Attorneys conferring.)

2 THE COURT: All right.

3 MR. JIMERSON: We're going to sign, Your Honor.

4 THE COURT: You're going to sign the *Old Chief*
5 stipulation. Okay. Go ahead and do that, and then we'll --

6 Okay. So now let me then start with
7 Mr. Washington's -- well, the pretrial motions that relate to
8 Mr. Washington. So there's a Government motion. Well, the
9 first one, I guess, is the Defendant's motion to preclude
10 404(b) evidence, and like I said, I've got a big stack of
11 these, so let me find the right one. Okay. So the Defendant
12 has moved to preclude evidence of his prior convictions as
13 anticipating, of course, that the Government would seek to
14 admit these under 404(b), and I would like to just right now
15 confine myself to the 404(b) discussion, and then we can
16 discuss the 609 issues in a moment, and as I understand -- so
17 what -- what exactly is the Government intending to introduce
18 as 404(b) evidence? Do I understand correctly it's the 2002
19 conviction for residential burglary and felony theft?

20 MR. STEVENS: That's correct, Your Honor. We did --
21 we gave notice of other convictions. I don't intend to pursue
22 those under 404(b). It's just the burglary and theft.

23 THE COURT: Okay. So, Mr. Lynch, I'll hear anything
24 you wish to say about that. I have read your brief, of
25 course.

1 MR. LYNCH: Yeah, and, Your Honor, I'll rest
2 primarily on what I introduced in the brief. I would note,
3 Your Honor, first, the age of this particular conviction and,
4 more particularly, the facts and circumstances underlying
5 those two charges. It's from Arkansas, from 2002. It
6 involved a burglary and theft of a residence for which my
7 client received a suspended imposition of sentence. I'm not
8 saying that for purposes of whether or not it's a conviction
9 but just so the Court knows what the punishment was, and more
10 applicable to this case, there's no evidence to suggest it
11 involved any type of violent actions, possession of a handgun,
12 theft of narcotics, so I don't think it's sufficiently
13 analogous with the present charges such that it should be
14 introduced under 404(b), and then I'll rest on what I issued
15 in writing, Judge.

16 THE COURT: All right. All right. And so,
17 Mr. Stevens, why -- why would that be appropriate 404(b)
18 evidence?

19 MR. STEVENS: Well, Judge, in this particular case,
20 we have the -- the charged conspiracy to possess with intent
21 to distribute cocaine involved, as the Court is aware from the
22 briefs, a conspiracy involving these Defendants to forcibly
23 enter a drug stash house and steal cocaine from inside the
24 stash house, which would essentially be a burglary and a
25 theft.

1 THE COURT: Well, it would be an armed robbery as
2 well, right?

3 MR. STEVENS: Yes.

4 THE COURT: I mean that's -- because they were -- as
5 I understand your evidence, you're going to try to prove that
6 they were, you know, going in with guns and fully expecting
7 violence to result and that there was a large quantity of
8 cocaine involved.

9 MR. STEVENS: That's absolutely right, Judge. In
10 fact, two firearms were recovered from Mr. Warren's car during
11 the course -- basically, at the end of the conspiracy when
12 they were -- when they were both arrested, but there's --
13 there will be evidence of all kinds of conversation about this
14 drug stash house with armed guards and the amount of cocaine
15 in there. During the course of the conspiracy, a meeting
16 where Mr. Washington was also present, Mr. Warren indicated he
17 expected this to be a shootout, and so when you look at the
18 actual evidence of the conspiracy, the evidence would be quite
19 similar to a burglary and theft from the house, an armed
20 robbery.

21 THE COURT: Well, okay, but now let me -- let me find
22 out. I thought -- this was residential burglary and felony
23 theft?

24 MR. STEVENS: Yes.

25 THE COURT: And I don't see anything in there about a

1 gun or violence. I know that burglary is always considered a
2 crime of violence because there's always a chance that the
3 dwelling will be occupied --

4 MR. STEVENS: Yes.

5 THE COURT: -- but, frankly, most burglaries, the
6 burglars -- at least the ones I've heard evidence about --
7 don't really usually anticipate that there will be people in
8 the house, where in this one they did anticipate people would
9 be in the house, so -- and also, was there evidence of a gun
10 in the -- in the burglary and felony theft conviction?

11 MR. STEVENS: No, there was not, Judge, but --

12 THE COURT: So we have no gun, no drugs, and we don't
13 know whether the house was occupied or not?

14 MR. STEVENS: That's correct.

15 THE COURT: Do we know what was stolen?

16 MR. STEVENS: I don't know that, Judge. I do know,
17 obviously, that what it was is an illegal entry into the house
18 for the purpose of committing another felony, which is -- I
19 mean, generically, that's what we have here, entering this
20 stash house for the purpose of committing another felony.

21 THE COURT: Yeah, I'm trying to remember from what
22 your evidence is going to be that they were planning to do.
23 They were planning to -- the undercover guy was supposed to go
24 in and pick stuff up. Were they supposed to even be with him
25 when he went in the house?

1 MR. STEVENS: I think what they expected to do was to
2 go in as he was coming out, to enter the house at that time to
3 do the robbery.

4 THE COURT: Okay. That's what your evidence --
5 that's what you expect your evidence will show?

6 MR. STEVENS: Yes, Judge.

7 THE COURT: So tell me how this proves any of the
8 items that are listed in Rule 404(b).

9 MR. STEVENS: Well, I think it -- it certainly goes
10 to Mr. Washington's intent and motive regarding this
11 particular conspiracy.

12 THE COURT: How is that different from propensity in
13 this case?

14 MR. STEVENS: Well, it's -- essentially, I mean, if
15 we're talking about his motive for going into the house, it's
16 to commit another felony, and I think what that -- what it
17 establishes is that -- and on prior occasions, considering the
18 burglary and the theft, that it shows what his motive would be
19 on entering the house. It also goes to his knowledge about
20 how similar crimes are committed, and I think for those
21 reasons it's relevant beyond simple propensity evidence.

22 THE COURT: You know, I don't think it is, and my
23 reason -- I'm going to exclude the evidence and grant the
24 motion to exclude this particular evidence, and here's my
25 reason. We have no guns, no drugs, no violence involved in

1 the prior conviction. The only thing we have is, as you say,
2 an intent to go into a dwelling and commit a crime. We don't
3 know more facts about the -- about the residential burglary
4 and felony theft, but we all know that in most cases, a
5 residence is what's intended to be burglarized. In this case,
6 as I understand it, the plan was to go into what was believed
7 to be a stash house, whether people lived there or not,
8 knowing something's a stash house and you're going in
9 expecting to rob people, expecting violence, expecting a large
10 amount of cocaine, expecting to shoot people. Those things
11 are really serious, and I simply don't see how committing a
12 residential burglary and felony theft 12 years ago where you
13 get an SIS, which means by definition it must not have been
14 super serious in the view of the court system and the
15 prosecution down in Arkansas, although we don't know more
16 about it -- I don't see that it's -- it's similar enough. I
17 think that it's really not similar, and therefore, I don't
18 think it -- and I also don't think -- because it's not
19 similar, I don't see how it shows the propensity to commit
20 this crime. I do recognize that any burglary is a crime of
21 violence and there is always a potential for violence in a
22 burglary, but this case is very different. This, as I
23 understand the Government's argument, is a planned, you know,
24 an expected violent crime involving large quantities of
25 cocaine and involving guns and, like I say, anticipated

1 violence of a stash house, so I don't think it's similar
2 enough, and so because of that, I am going to exclude that
3 conviction. So I'm granting Defendant's motion, #160, to
4 exclude that evidence as 404(b) evidence.

5 Now let's talk about it as 609 evidence. The only --
6 one question I had about this, about this then -- this is the
7 Defendant's motion, #161, and the only issue I had about
8 that -- in the Government's response that was filed, I guess,
9 recently, if I find it -- hold on just a second. Yeah. Okay.
10 The Government's response says that -- the Government's
11 response doesn't deal with the 609 issue of timing,
12 timeliness, so can you explain your response on the timing
13 issue?

14 MR. STEVENS: Yeah, Judge, and I think we can
15 shortcut that. I've already informed Mr. Lynch that I do not
16 intend to get into the 2002 burglary and theft if
17 Mr. Washington testifies, that it is beyond the 10 years, and
18 so I -- I'm not seeking to impeach him with that particular --
19 with those particular convictions from 2001 or 2002, and
20 instead, I would just seek to impeach Mr. Washington with the
21 domestic assault, second degree, convictions, which, of
22 course, are within the 10 years.

23 THE COURT: And tell me the dates of those domestic
24 assault convictions.

25 MR. STEVENS: They were three counts in the same

1 case, Judge, and I can give you the precise dates. They
2 were -- he was convicted on September 2nd of 2009 on three
3 counts of domestic assault, second, felonies, and also on two
4 counts of domestic assault, third, misdemeanors. Of course,
5 I'm not seeking to impeach him on the misdemeanors from that
6 same case. It would be the three counts of domestic assault,
7 second degree, from September 2nd of 2009.

8 THE COURT: And when did those assaults occur?

9 MR. STEVENS: They occurred on May 22nd of 2009.

10 THE COURT: And do you know any -- well, Mr. Lynch,
11 I'll hear any argument you wish to make. I mean your argument
12 was, basically, that domestic assault is going to be unfairly
13 prejudicial because jurors will be -- you know, will hold it
14 against him, not just for his credibility, but, basically,
15 for -- I guess just because they won't like him because of
16 domestic assault convictions, right?

17 MR. LYNCH: That is correct, Your Honor.

18 THE COURT: And do you know any circumstances of
19 these domestic assaults? Three counts that all occurred on
20 one day make me wonder; is it three different victims?

21 MR. LYNCH: It's one victim, Your Honor. It was an
22 ex-girlfriend, and being honest with the Court, it involved a
23 physical altercation between the two, and Mr. Washington was
24 punished for it; however, I think that --

25 THE COURT: Did he plead guilty or go to trial?

1 MR. LYNCH: He pled guilty, Judge.

2 THE COURT: Okay.

3 MR. LYNCH: He received two years' imprisonment for
4 it. I think if it comes in, Judge, it has to come in under
5 (a)(1), 609(a)(1) obviously.

6 THE COURT: Hold on just a second. Okay. Go ahead.

7 MR. LYNCH: Judge, my -- obviously, I think my
8 client's going to be prejudiced when jurors, primarily female
9 jurors, hear that he beat up an ex-girlfriend because that's
10 what the case is. I think that -- so that's the prejudicial
11 effect. My question is -- and in my motion -- what's the
12 probative value of impeaching him with evidence of a prior
13 domestic assault? The domestic assault did not involve
14 weapons. It did not involve drugs. It involved an act of
15 violence. My client's not charged with committing an act of
16 violence, and I think an issue in this particular case,
17 Judge -- we are going to strenuously argue that my client was
18 not going to actually go into the Mexican cartel stash house
19 that the ATF offered up, so I think for those issues, it's
20 precluded under 609. I don't see a value that would do
21 anything other than make the jurors hate my client, and that's
22 not what we're here for.

23 THE COURT: Well, isn't the theory that if someone is
24 inclined to commit one crime, even if it's not at all similar
25 to the crime he's charged with, that that means he has

1 disregard for the penalties of perjury? I mean I guess that's
2 the generic theory, is that right?

3 MR. LYNCH: Yes, and I think -- but I still think the
4 Court should conduct a 403 analysis, which is included in the
5 rule as well.

6 THE COURT: Yeah, I must actually.

7 MR. LYNCH: And so I think that's there for a reason
8 because if the generic theory regarding 609 was to be
9 applicable all the time there would be no limitation. So the
10 reason that it was promulgated with that -- I will call it an
11 exemption -- is so the Court can provide limits in its
12 discretion as to when certain cases or certain convictions
13 come into evidence.

14 THE COURT: All right. Mr. Stevens, let me hear your
15 response to that on the -- why is the -- I mean, am I -- is
16 there another reason why this is relevant to his truthfulness
17 if he testifies?

18 MR. STEVENS: Well, it's just the standard reason,
19 Judge, that it impeaches his credibility if he testifies. If
20 he testifies --

21 THE COURT: Well, but hold on.

22 MR. STEVENS: Yes.

23 THE COURT: That's not an answer. My question is,
24 why does it impeach his credibility, and the only thing I know
25 of is it's considered to show that he's untruthful to the jury

1 because he committed a crime; therefore, if he committed
2 another crime, he might be or must be or will be -- I don't
3 know -- willing to commit the crime of perjury in testifying
4 falsely to them. That's the only -- there's no other reason,
5 right?

6 MR. STEVENS: No. I mean it's -- as the Eighth
7 Circuit explained in *Hedberg*, Judge, his prior -- the prior
8 convictions are highly probative of his credibility because of
9 the common sense proposition that one who has transgressed
10 society's norms by committing a felony is less likely than
11 most to be deterred from lying under oath, and this
12 evidence -- obviously, when a defendant testifies -- and his
13 credibility will be front and center. If what Mr. Lynch says
14 is true, that he's going to testify he never intended to go in
15 there or whatever, that will be contrary to what the agent is
16 going to testify to. His credibility will be directly in
17 question, and that's why this has extremely highly probative
18 value.

19 THE COURT: Well, extremely highly -- I mean it's not
20 like it was a -- I mean extremely high probative value, seems
21 to me, is some kind of crime of dishonesty, and there's no
22 element of dishonesty in domestic assault.

23 MR. STEVENS: No, but I think that's a different test
24 under the rule, Judge, under 609 as far as --

25 THE COURT: Well, but the balancing is I have to

1 weigh the potential for unfair prejudice against the probative
2 value.

3 MR. STEVENS: Yes.

4 THE COURT: And so that is where it comes in, and I'm
5 trying -- the probative -- that's -- so I'm trying to do that
6 analysis, which is the same as a 403 analysis, but it's really
7 required under 609(a)(1)(B).

8 MR. STEVENS: Yes.

9 THE COURT: So tell me why the potential for
10 prejudice -- you know, the prejudicial effect to the Defendant
11 is outweighed by the probative value.

12 MR. STEVENS: Well, obviously, anytime you're going
13 to impeach a defendant with his prior felony conviction,
14 there's going to be prejudice, but the question is whether,
15 obviously, that outweighs the probative value and whether it's
16 undue prejudice, and in this case, if he's going to testify
17 that he never intended to go in that house and to be involved
18 in the conspiracy or whatever it is he's going to testify to,
19 then his credibility is directly at issue, and in those types
20 of cases, as in *Hedberg*, the Eighth Circuit has explained that
21 it's -- that the probative value is extremely high for the
22 defendant's prior conviction to impeach him with the prior
23 conviction.

24 THE COURT: Why do we have the exception in
25 609(a)(1)(2) -- I'm sorry -- 609(a)(1)(B)? I mean what --

1 what -- what's an instance where the prejudice would outweigh
2 the probative value? Is it your position that it really can't
3 ever happen --

4 MR. STEVENS: No.

5 THE COURT: -- or only if he's like a serial killer
6 or something like that?

7 MR. STEVENS: Not necessarily, Judge. I think -- but
8 I think -- in -- I'll say this. In cases like this, where if
9 he's going to give a version of events that's different from
10 the evidence that we're -- as opposed to, you know, testifying
11 to an affirmative defense or that would apply regardless of
12 what the Government's case-in-chief was, then his credibility
13 is directly at issue. He puts his own credibility directly at
14 issue because it's contrary to what the Government's case is,
15 and so, certainly, in those cases, like this case, we -- we're
16 entitled to impeach him with his prior felony convictions.

17 THE COURT: So when would the prejudice -- I mean
18 that's almost all the cases it's going to be -- where a
19 defendant testifies, he's going to be controverting the
20 elements of the Government's case. There are a few where we
21 have affirmative defenses, but so are you saying this is
22 really just reserved for affirmative defenses --

23 MR. STEVENS: No.

24 THE COURT: -- because I think they could have said
25 that if that's what it was.

1 MR. STEVENS: They could have, Judge, but I'll tell
2 you, I mean, you might be right, that that may be essentially
3 every case, and that may be why Mr. Lynch can't cite a case
4 where the court has excluded the defendant's prior felony
5 convictions from impeachment when he testifies. There's one
6 case I cited in which the -- the court actually overturned the
7 district court's exclusion of the testifying witness' prior
8 convictions. That was *Cummings versus Malone*, Eighth Circuit
9 in 1993.

10 THE COURT: Slow down a little bit.

11 MR. STEVENS: I'm sorry.

12 THE COURT: The court reporter can't do that.

13 MR. STEVENS: Yeah. I'm sorry, Judge. *Cummings*
14 *versus Malone*, Eighth Circuit in 1993. The Eighth Circuit
15 reversed a district court's exclusion of a testifying witness'
16 prior convictions. As I indicated in my brief, the court
17 reasoned that because the parties had testified to
18 contradictory versions of the facts, the jury should have
19 heard that the witness had prior felony convictions.
20 Specifically -- and I quote -- the court stated, "The jury
21 should have heard Cummings' specific convictions because most
22 jurors probably do not understand the range of offenses
23 connoted by the term 'felony'. They need to know the specific
24 crime in order to evaluate its effect on credibility." And so
25 the Eighth Circuit concluded that the jury should have heard

1 the specific felonies, and that's *Cummings*, 1993. I haven't
2 come across any other reported cases where a district court
3 has excluded a defendant's prior convictions for impeachment
4 under 609 and that that's been affirmed. Now, obviously, it
5 is in the Court's discretion and the Court has to make this
6 determination, but I think what's clear, because those cases
7 really aren't out there and based on the Eighth Circuit's
8 prior rulings, that in cases like this where the defendant
9 testifies to something contrary to the Government's case, then
10 the Government should be entitled to impeach him with his
11 prior convictions, at least the ones within the 10-year limit,
12 and that's simply because the probative value is so high,
13 Judge, when the Defendant's credibility is directly at issue.

14 THE COURT: Go ahead.

15 MR. LYNCH: Your Honor, I don't -- I think that the
16 Government articulated properly the overall theory in 609, but
17 to say that because the Eighth Circuit hasn't ruled the other
18 way or the Government hasn't found a case doesn't necessarily
19 mean in this specific instance the Court could find that the
20 prejudicial effect outweighs the probative value.

21 I also don't think the Government provided you with a
22 sufficient response as to what the probative value in this
23 particular instance would be. I think that the Government
24 conflated the two issues of my client's right to testify, and
25 that automatically conjures up issues of dishonesty or

1 truthfulness or credibility? I don't think that's how the
2 system was created, and I think that's why -- if you look at
3 the legislative history, which I did provide to the Court in
4 writing, that's why the 403 analysis was incorporated in the
5 rule. So to state that every time a client chooses or
6 exercises his right to testify automatically will invoke an
7 unfettered right to impeach him with everything he's done in
8 his past, I think, operates in derogation of the other rules.
9 If the Defendant gets to impeach a witness, there are rules
10 and limitations on what I can do to the Government's
11 witnesses, and I think it should apply equally in this case,
12 and I think just purely on a 403 analysis, this Court could
13 find that it's more prejudicial than probative. I still have
14 not heard a specific fact or a factual basis to conclude that
15 the probative value of saying he beat up his ex-girlfriend now
16 shows that he's going to lie to the jury. If anything, I
17 think you could argue the other way.

18 THE COURT: Yeah, I think this is pretty close. I
19 really do. I'm -- I'm -- I'm unsure on this. I'm going to
20 look at this and think about it, and I'll let you know before
21 we start the jury selection later today. I believe it is
22 really close, and it's a -- because it is such a -- well, I'm
23 just -- I'm just worried that the jury would be believing
24 that, you know, he's obviously a bad guy and this would be a
25 propensity type of thing instead of -- what kind of limiting

1 instructions do we give for this kind of evidence?

2 MR. STEVENS: Well, if that's the sole purpose for
3 which it comes in, Judge, the impeachment of the Defendant,
4 then under Rule 609, we would -- we would -- in fact, we
5 submitted, I believe, that instruction --

6 THE COURT: Yeah.

7 MR. STEVENS: -- and that would be that the jury can
8 consider it only for determining his credibility and for no
9 other purpose, and it also, I believe, reminds the jury that
10 he's on trial for only the crimes charged.

11 I would also point out, Judge, that, you know, for
12 all the talk of him beating up his girlfriend and everything
13 else, obviously, I can't get into that to impeach him with it.
14 What I can get into is simply the name of the offense and what
15 the sentence was.

16 THE COURT: Yeah, that's right actually. That's --
17 that's what -- that's all you can do.

18 MR. STEVENS: Yeah, and that's all I would -- of
19 course, that's all I would intend to do.

20 THE COURT: Right. Well, I'm going to think on this
21 one because I do think -- and it's the nature of the -- of the
22 crime of domestic assault that gives me the pause and, I
23 think, leads to the prejudice because there are a lot of
24 people who do have a very knee-jerk reaction to domestic
25 assault. You know, I'm trying to think of other crimes for

1 which people would have knee-jerk reactions, and I -- you
2 know, obviously, the problem is the other crimes for which the
3 knee-jerk reactions come out are all much more serious violent
4 crimes. This is a violent crime, but -- yeah, maybe that's
5 the problem. Maybe I'm thinking of it as less serious. I
6 will think about this, and so we'll see where we go on that.

7 Okay. So penalty information. Do you have any
8 intention of introducing evidence of penalty information? The
9 Government filed a motion in limine to preclude you from doing
10 so.

11 MR. LYNCH: No, not specifically with respect to the
12 Government's witnesses; however, Judge, as the Government
13 would probably concede, there are a lot of recordings in issue
14 in this case, Judge, and I would say several of the recordings
15 involved discussions -- some are incorrect because we've all
16 listened to them -- with respect to the potential punishment
17 for being in possession of a firearm.

18 THE COURT: Explain to me about the recordings.

19 MR. LYNCH: Well, there are recordings that I
20 anticipate the Government will introduce from an undercover
21 ATF vehicle wherein all three of the Defendants were placed --
22 my client, Mr. Warren, and Michael Twitty. During the course
23 of, I think it's a 33-minute conversation, Mr. Warren
24 specifically is talking about what he perceives to be the
25 federal Guidelines and the statutes for being in possession of

1 a gun, whether or not these charges run concurrently or not,
2 what he thinks the time would be for possessing a gun versus
3 the drug counts, and I think all of that is fair game because
4 (a) he's not a lawyer and that's not exactly what it is -- I
5 think he's wrong in a lot of respects -- and (b) I'm not
6 eliciting that from a professional witness, such as a law
7 enforcement witness, and the jury's not going to hear that it
8 applies specifically to my client.

9 MR. STEVENS: Well, Judge, I'm not going to play any
10 clips of any conversations that deal with the amount of time
11 that these Defendants might be looking at, whether they're
12 correct or incorrect. I just -- I'm not going to do that.

13 THE COURT: You're not going to play the clips that
14 involve those conversations in the car?

15 MR. STEVENS: No, no, correct.

16 MR. LYNCH: Well, Your Honor, that may be an issue
17 then because if we -- that might totally deflate the
18 Defendant's ability -- Mr. Washington's ability to defend
19 against the charges of possession of a firearm under Counts IV
20 and V. If the Government is allowed to just play clips of
21 that particular conversation I reference, it's going to
22 totally place the entirety of that conversation out of
23 context. I think it has to be played in its entirety or
24 substantially in its entirety for the jury to comprehend
25 exactly what's going on.

1 MR. STEVENS: Judge --

2 MR. LYNCH: I think there's a -- sorry.

3 MR. STEVENS: Go ahead.

4 MR. LYNCH: There's going to be a Rule 106 -- a rule
5 of completeness issue if we allow that to happen, Judge, and
6 I'm not saying that -- I think the conversation doesn't start
7 until about seven minutes and 20 seconds into it, and then it
8 ends about four minutes before the tape ends. So you're only
9 talking about 20 minutes, but I think for contextual reasons,
10 Judge, we have to allow the entirety of that conversation if
11 it's admitted into evidence by the Government to be played
12 before the jury.

13 THE COURT: Okay. So, Mr. Stevens, what do you
14 intend to do with those recordings?

15 MR. STEVENS: Well, Judge, with that particular
16 recording, I think it's unlikely we'll play any of it, but,
17 certainly, I agree with Mr. Lynch that if we do play any
18 portion of it, the rule of completeness would allow them to
19 play other relevant portions. I think he'd be entitled to do
20 that. At this point, I doubt that we'll play any of that. It
21 kind of depends on how things play out here in court. If we
22 do, then I think certainly other portions of that particular
23 conversation are admissible, assuming they're relevant. Now,
24 I guess, you know, maybe we can just see if we get there --

25 THE COURT: Yeah.

1 MR. STEVENS: -- but -- but I would point out,
2 obviously, at this point, that if we played certain
3 conversations, I'm not -- well, we can see how it all plays
4 out.

5 THE COURT: Right. I understand what you're saying.

6 MR. STEVENS: Yeah.

7 THE COURT: Okay. Well, Mr. Jimerson, do you want to
8 step up to the lectern? You had a similar motion, or the
9 Government's motion was also directed to you. Do you wish to
10 say anything to this issue of the penalty information, what
11 you intend to introduce or do?

12 MR. JIMERSON: Your Honor, I believe Mr. Lynch pretty
13 much gave what I think my argument would be on this matter.
14 In response to -- we don't intend to introduce anything
15 regarding penalty or anything of that nature, so -- but I
16 would join Mr. Lynch in his argument regarding the -- what to
17 preclude, Your Honor.

18 THE COURT: Okay. Well, I'm going to -- I'm going to
19 grant the Government's motions on penalty, so this is motions
20 16 -- it's motion -- 163 is granted, and the -- I don't
21 believe that it's appropriate to introduce the penalty
22 information. It's not something for the jury, and so I'm
23 telling everybody they cannot do that. I will reconsider that
24 if the Government does something that makes it relevant in
25 some way to the jury determination.

1 So then let's talk about while you're there,
2 Mr. Jimerson, there's other -- okay -- your other motions that
3 you have filed, and -- and in particular, let me just take
4 them in order. The first one was about you sought to
5 preclude -- this is #168. You sought to preclude the
6 Government from introducing evidence related to, I guess, the
7 success of prior sting operations, and the United States says
8 in response that their witness, when he testifies, will say,
9 "Oh, yeah, I've done this lots of places, and here's what I've
10 done," but that he's not going to say that they were
11 successful or that people pleaded guilty or anything like
12 that. So I'll hear any arguments you wish to make on that.

13 MR. JIMERSON: Sure. Thank you, Your Honor. I
14 appreciate Mr. Stevens saying what his witness won't do in
15 terms of limiting his witness, but I believe the idea that
16 they're talking at all about prior sting operations, Judge, is
17 unduly prejudicial. Particularly, what's happened in another
18 matter is not necessarily relevant or pertinent or probative
19 to anything that would happen in this case. The issue, I
20 believe, is -- is -- is if his witness is going to testify
21 that -- that he had conversations or did such and such, I
22 think it's limited to just what we have here. To say that in
23 Florida -- and I think that was my concern. Over the nation,
24 they're beginning to use these models in terms of these
25 stings, you know, just going around particularly, and I

1 believe that that's my concern is that they're beginning to
2 use something here in this district now, you know, that I
3 think is not necessarily -- it's affected my client, but I
4 think it's going to affect other clients to say that this is
5 what we can do regarding a sting operation, you know, we can
6 create fictitious amounts of dope, fictitious amounts of
7 money, fictitious cartels. Judge, I believe that that is
8 unduly prejudicial to say that this is what we can do. I
9 believe just limiting the officer to saying that "I've had
10 prior experience in these type of operations" -- I still think
11 that's unduly prejudicial to Mr. Warren and --

12 THE COURT: Let me -- let me ask you this. You also
13 had a motion that's somewhat related to this, which is about
14 the amount of drugs.

15 MR. JIMERSON: Right.

16 THE COURT: And it's -- it's an interesting argument
17 because, I mean, the Government has -- that's an element of
18 one of their charges, and so what you're saying is that -- at
19 least I thought it was -- is the conspiracy -- oh, it's not.
20 The -- there's not a quantity charged?

21 MR. STEVENS: There is, Judge. It's charged --

22 THE COURT: Which count?

23 MR. STEVENS: It's Count III.

24 THE COURT: Yeah, okay.

25 MR. STEVENS: It's charged as in excess of five

1 kilograms of cocaine.

2 THE COURT: Right. And I knew it was there. I just
3 wasn't finding it. So Count III.

4 MR. JIMERSON: And I said 50 in the motion, Judge.
5 That's an error, but --

6 THE COURT: Right, but still, I mean, that's an
7 element of their case, and so what's your argument for -- that
8 they can't -- should not be able to do that?

9 MR. JIMERSON: Sure, you know, and, Judge, I believe
10 the issue is -- as we said before, I don't believe the
11 government can create, you know, sufficient quantities of
12 things that they can punish the defendant with, and here, we
13 don't -- this is a fake stash house. This is a fake amount of
14 drugs. There's no drugs. There's no cash ever exchanged
15 between the Government witnesses and -- and my client.
16 There's nothing of that nature that's done. Of course, we're
17 going to argue that his participation was minor, if anything,
18 but, Judge, I believe if we get to talking to the jury
19 about -- about -- about anything ranging from five kilos to 23
20 kilos -- I think I've heard that number in the tapes or 25
21 kilos -- I think, basically, that is, again, unduly
22 prejudicial, and particularly, when it comes to -- I believe
23 you're looking at it from a sentencing standpoint. I think it
24 creates a severe punishment to the Defendant when really
25 there's nothing really that ever happened there. So to start

1 creating these types of crimes, to say that it's five to 15 --
2 we have nothing definite -- it's five to 23 or it's even less
3 than that, Judge, I believe that -- how can you punish when
4 it's not factual? And that's my concern here is that
5 something has been created, it's not factual, we now have to
6 defend against something that's not factual, and I believe
7 that's unduly -- again, it's unduly prejudicial and really not
8 probative to anything in terms of this case.

9 THE COURT: Okay. Well, and that -- that argument is
10 an argument -- it's sort of an overarching argument. I
11 understand it --

12 MR. JIMERSON: Yes, ma'am.

13 THE COURT: -- but I don't think it goes directly to
14 this. I think it's clear that the Government can introduce
15 evidence of the quantity, whatever evidence it thinks it has,
16 and then that can be challenged, but, Mr. Stevens -- so on the
17 motion regarding the quantity of drugs, the amount of drugs,
18 which is #169, that motion is denied.

19 Mr. Stevens, though, tell me what it is your client
20 is going to -- I mean your witness is going to say about --
21 about these prior operations.

22 MR. STEVENS: It would be entirely generic, Judge.
23 He wouldn't be referring to any specific case.

24 THE COURT: So what's he going to say?

25 MR. STEVENS: He would say that he's been doing these

1 for about 20 years and that what -- that it --

2 THE COURT: Doing these what?

3 MR. STEVENS: These sorts of home invasion robbery
4 investigations where he's -- he -- for the last 20 years or
5 so, he's done essentially nothing but undercover
6 investigations. We'll go through his experience and training
7 regarding those and that at this time his primary
8 undercover -- primarily, his undercover operations are home
9 invasion robbery type investigations, and he'll go through
10 that what they typically do is if they meet somebody who they
11 think may be involved in criminal activity, the investigation
12 proceeds from there where they'll have several meetings to
13 determine whether or not they're interested in doing this kind
14 of home invasion robbery. He'll talk about the different
15 tactics that they use in connection with these kinds of
16 investigations. That is multiple meetings.

17 THE COURT: So why do we care what they normally do
18 and not what they did in this case?

19 MR. STEVENS: Well, I think it goes to his
20 experience, obviously. If they're going to attack this tactic
21 that law enforcement uses, I think it's worthwhile for us to
22 show that he's experience with this tactic, that it has
23 evolved over time, and that in this particular case, he's --
24 he's doing this undercover investigation with 20 years of
25 experience in these sorts of investigations, and I think it's

1 going to be important for him to be able to explain why they
2 do what they do. Obviously, at least part of the defense is
3 going to be to attack this kind of an investigation, and so I
4 think it's -- it's necessary for him to be able to talk about
5 his experience with these sorts of investigations. I mean
6 he's not going to get anywhere near the rate of success. He's
7 not going to get anywhere near court outcomes, anything like
8 that. It's simply, "This is the way we approach these
9 investigations, and I've been doing these for 20 years."

10 And it's also an introduction, Judge, to what we
11 intend to play. I mean we'll play videos of each of these
12 meetings. I mean he'll -- he'll say, "The way we conduct
13 these investigations is we have multiple meetings. We'll have
14 four separate meetings with potential defendants."

15 And then --

16 THE COURT: Why can't -- why can't he just say what
17 he did in this case?

18 MR. STEVENS: Well, he -- he --

19 THE COURT: Why does -- why does he need to say what
20 he usually does? Why not just say what he did in this case?

21 MR. STEVENS: Well, I think he'll say, "This is the
22 undercover tactic that we used in this particular case, and
23 this is my experience with it."

24 THE COURT: But why is his experience relevant if --
25 if -- I mean I know what he did. I'm just trying to figure

1 out why he gets to go into, "I've been doing this for 20
2 years," because the jury is going to say, well, if he's been
3 doing it for 20 years, you know, everybody does the same
4 thing, they must all be guilty. Why can't he just say what he
5 did in this case?

6 MR. STEVENS: Well, I think, Judge, because his
7 experience -- it's for exactly that reason because it's
8 important for them to understand his experience with it. They
9 are going to attack the -- the tactics that they used in this
10 particular case, and I think it's worthwhile for him to be
11 able to explain, "These are the reasons we do the things we
12 do, and these are the tactics that we use."

13 May I have a moment, Judge?

14 THE COURT: Yeah.

15 MR. STEVENS: To take it a step further, Judge,
16 Mr. Jimerson also submitted a proposed instruction on
17 entrapment, and I would expect that, you know, whether --
18 whether they actually in fact at some point request that
19 instruction or not, I think they're going to be arguing,
20 essentially, an entrapment defense, and that is that these
21 agents induced these Defendants to do this, and I think it's
22 important for him to be able to talk about his experience,
23 that he has enough experience to know at what point -- you
24 know, to read people and that kind of thing to not induce
25 people improperly, and I think he's not going to testify to

1 that, that "I have the experience to not induce people," but
2 what he would testify to is that "This is the operation that
3 we used in this particular -- this is the operation we use,
4 and we used it in this particular case," and I think it
5 explains to the jury before they see exactly what was done
6 here what this tactic is and why it's done the way that it is.
7 It's -- it's nowhere -- as far as Mr. Jimerson's motions with
8 the outcomes of these kinds of things, I'm not going to ask
9 him to testify and he won't testify to anything close to the
10 outcomes of these kinds of cases.

11 THE COURT: He won't need to --

12 MR. STEVENS: Well --

13 THE COURT: -- because the jury will understand if
14 you're doing something and you keep doing it for 20 years and
15 you tell the jury, "This is how I do it, and I always do it
16 this way, I've been doing it for 20 years," the jury is going
17 to know that the only reason he does that is because it works,
18 and the only way it works is if people are actually arrested
19 and convicted of this.

20 MR. STEVENS: Not necessarily, Judge. I mean, in
21 talking to this agent, there are plenty of instances also
22 where defendants simply walk away and aren't involved. I mean
23 so it doesn't always --

24 THE COURT: Is that also part of what you intend to
25 introduce?

1 MR. STEVENS: No, no, but -- well, I can. I mean
2 certainly I can ask him that, "At this particular point, you
3 know, have you had defendants in the past who have walked away
4 from this or who" -- but I don't intend to get into outcomes.

5 THE COURT: Actually, that's part of what
6 Mr. Jimerson is trying to preclude, both sides of it, I think.

7 MR. STEVENS: I suppose, but I point out, Judge, that
8 it wouldn't be any different from having an undercover agent
9 who's done undercover buys for 20 years, testifying to "Here's
10 how we do an undercover buy. You know, we wire up the car,
11 and we wire me up, and if there are informants involved, we
12 search them and make sure that there's not anything on them,
13 and then this is how we do these kinds of undercover buys, and
14 that's what we did in this case." It's clear to me that
15 there's going to be an attack on this type of investigation
16 and this tactic, and I'm not -- as I said, Judge, I'm not
17 interested in getting into outcomes. I don't think that's
18 fair, but I think it's worthwhile to get into the fact that he
19 has experience with this type of investigation. I think
20 that's important.

21 MR. JIMERSON: Thank you, Your Honor. Your Honor, I
22 think you said it, particularly, much better than I could.
23 Twenty years of doing something does not mean that you
24 continue to do something that fails. It's going to be
25 inferred that 20 years of doing something means that you're

1 successful at it or there's some reason why you're doing it
2 this way. If not, you're going to get kicked off the force
3 for continuing to be failing for 20 years. It doesn't make
4 sense. So to say -- if he's allowed to say that alone, I
5 believe, gives some -- really some more weight to his
6 testimony than necessary, or also, it broadens the burden that
7 we have here with my client, particularly, to prove his
8 innocence, even though we shouldn't have to do that, but I
9 think it shifts the burden to him about now how he was not
10 doing it. I think that's really dangerous for him to go into.

11 We will say, Judge, if the witness wants to say, "I
12 have some experience in this," that's limiting. I may be
13 compromising, but I think that could be limiting sufficiently
14 enough, but to say that he's had 20 years or more doing these
15 raids or whatever, I think, is just really -- it's going to be
16 so overreaching and unfair to Mr. Warren as well as anybody
17 else in this matter.

18 MR. STEVENS: Judge, if I may, I mean I don't see how
19 it's any different from, based on Mr. Jimerson's argument, a
20 homicide detective testifying he's been a homicide detective
21 for 20 years. I mean that doesn't mean his investigations
22 always worked out well or that he was always successful,
23 but --

24 THE COURT: Yeah, but this is a different sort of an
25 operation. In a homicide investigation, you usually have a

1 real dead person, and in this kind of investigation, you don't
2 really have any, you know, Mexicans and, you know, armed
3 Mexicans with 32 or 23 or however many kilograms of cocaine in
4 a house.

5 MR. STEVENS: But that's exactly my point, Judge, is
6 I think a large part of their defense is going to be to attack
7 this particular tactic and --

8 THE COURT: Yeah.

9 MR. STEVENS: -- I think in most cases a detective or
10 an agent can testify to their experience and the type of
11 operations they do and, particularly, in a case where they're
12 going to attack that.

13 THE COURT: Yeah, he can clearly testify that he's
14 worked undercover and that, you know, it involves drug and
15 firearm investigations or whatever. I -- I'm going to
16 withhold ruling on this one as well until I get back this
17 afternoon. I'll tell you before we start selecting the jury
18 what my ruling is on this. I am -- you know, this is an
19 unusual situation. I know there are many other cases where
20 there are, you know, conspiracies that -- that don't actually
21 involve something that's achievable, but I don't know. This
22 type of case is interesting, and so how far he can go is -- is
23 a problem, and I am concerned that he may say things that will
24 improperly and unfairly imply to the jury that this is a
25 technique that has been successful all these years.

1 Now, on the other hand, I need to know what the
2 Defendants are going to do with regard to this entrapment
3 issue, and so I guess I'd like to hear -- well, no, let me
4 come back to that now because that's a little harder. Let me
5 deal with the 404(b) evidence. The Government has filed a
6 motion to admit 404(b) evidence and, I assume, 609, although
7 I'm -- on Mr. Warren. I don't know if -- if you were going to
8 admit -- seek to admit these under -- well, they'd already be
9 in if they came in under 404(b), and as I understand -- this
10 is motion #173 -- the Government's motion -- and this was just
11 filed on Friday, but it is for Mr. Warren's prior convictions,
12 two counts of possession of a controlled substance in '07,
13 felon in possession of a firearm in '07, drug trafficking,
14 second, and possession in '01, and possession of a controlled
15 substance in 1999, and the other convictions that he has, the
16 Government was not intending to introduce under 404(b).

17 So, Mr. Jimerson, let me just hear any response you
18 have to this request to introduce these other -- these
19 convictions for other acts of drug possession and -- drug and
20 firearm cases.

21 MR. JIMERSON: Thank you, Your Honor. First, I'd
22 like to just point out to the Court that my client, other than
23 these charges here, has no prior adult record for violence,
24 okay, and I believe, particularly, the referenced reason the
25 Government wants to use these types of --

1 THE COURT: Well, these are not juvenile
2 adjudications. These are adult convictions.

3 MR. JIMERSON: That's what I'm saying. There is one
4 juvenile matter that was referred to when he lived in
5 Arkansas, but I heard from Mr. Stevens he's not going to try
6 to introduce that.

7 THE COURT: Yeah, possession of a firearm by a minor.
8 That's in the footnote. Okay. Go ahead.

9 MR. JIMERSON: Yes, ma'am. So other than -- other
10 than the convictions listed, there's nothing to indicate
11 violence on the part of my client toward, you know,
12 particularly, like robbery or any assault or anything of that
13 nature that applies to this case. So to try to use this as
14 some type of plan or some type of mindset by Mr. -- by
15 Mr. Warren is really, again, far-reaching and, I believe, is
16 not applicable to his -- the alleged things that the
17 Government is saying here. I think if -- however, if
18 Mr. Warren takes the stand, we understand that certain things
19 can come in. Again, I join the argument as before. One of
20 the convictions listed, Judge, is more than 10 years old,
21 particularly, the one listed in the drug trafficking, second
22 degree, possession of a controlled substance, 2001. Again,
23 that is more than -- that is more than 10 years old and, we
24 believe, not -- at this point, unduly prejudicial and not
25 relevant to anything, but -- but in terms of him saying that

1 this is a part of his makeup, Mr. Warren's makeup, his plan or
2 his character to get out and do something because he's a
3 violent person of that nature, in association with this type
4 of case, we don't believe that these cases necessarily
5 indicate that, and one particular thing that I -- and I
6 mentioned it in the other motion -- was that to say -- and
7 it's more for sentencing, but to say that he's involved with
8 this type of drug matters and -- and -- he doesn't have the
9 propensity to carry out that. I mean it's not been shown, but
10 in this case, Judge, particularly, these -- these charges are
11 not the same as the charges that the Government is alleging
12 here, and I believe just to try to connect them, make that,
13 it's unfair to Mr. Warren.

14 THE COURT: Okay. Well, I'm going to overrule your
15 objections, and I will grant the Government's motion, #173, to
16 introduce these four prior convictions that are listed in the
17 motion. These are things that the Eighth Circuit has clearly
18 held do go to things other than propensity. They are not so
19 remote in time that they should not be used, and there -- I
20 don't believe that -- you know, there's no unfair prejudice
21 from introducing these things because this -- as he's charged
22 with a crime of, you know, conspiracy to possess controlled
23 substances and also firearm offenses, and so I believe these
24 are all, you know, admissible under 404(b), so I will grant
25 the Government's motion in that regard.

1 MR. JIMERSON: Yes, ma'am.

2 THE COURT: Now, I need to ask you all about
3 entrapment, and I guess, Mr. Jimerson and Mr. Lynch, both,
4 tell me what, if anything, your intentions are about
5 entrapment, or if I -- if -- if you don't have to tell me now,
6 you can say, "I don't have to tell you now," but I need to
7 know if we're going to be arguing about entrapment.

8 MR. JIMERSON: Judge, I have no doubt that I will be
9 arguing about entrapment.

10 THE COURT: Yeah.

11 MR. JIMERSON: I can't speak for Mr. Lynch, but I
12 would. My client definitely believes that but for the
13 improper conduct of government through its agents definitely
14 entrapped him into doing something. In fact, he would also
15 want me to say that -- that he had voiced his intention not to
16 participate in such an endeavor, and as a result, we have no
17 choice but to try to prove that to the Court.

18 THE COURT: Okay. And Mr. Lynch.

19 MR. LYNCH: Your Honor, I don't believe I'm going to
20 be submitting an entrapment defense.

21 THE COURT: Okay. Now, let me ask you about this
22 joint trial. Hold on. And, Mr. Stevens, are there any
23 statements that you are introducing against one Defendant that
24 should not be introduced against the other? Do you have any
25 *Bruton* problems in this case?

1 MR. STEVENS: No, Judge, no.

2 THE COURT: Tell me -- before we talk about the joint
3 trial, tell me about the recorded evidence; what is it that
4 you're going to be playing and showing?

5 MR. STEVENS: Yes, Judge. We'll be showing there
6 were -- initially, May 21st of 2013, Robert Washington sold
7 about an ounce of cocaine to two ATF confidential informants.
8 We'll play portions of -- that's all video- and audio-recorded
9 in a --

10 THE COURT: Okay.

11 MR. STEVENS: It happened in a car, and we'll play
12 portions of that particular deal, three or four clips
13 regarding that.

14 May 23rd of 2013, there's another sale of cocaine by
15 Robert Washington, this time to the undercover agent, Richie
16 Zayas. We'll play several clips of that particular deal and
17 conversations that occurred then.

18 May 29 of 2013, Robert Washington meets with Agent
19 Zayas again. They discuss this potential home invasion
20 robbery. We'll play clips of that particular meeting, the
21 conversation between the two of them.

22 THE COURT: Video and audio both?

23 MR. STEVENS: Yes. All of it is video and audio.

24 THE COURT: Okay.

25 MR. STEVENS: And then on June 3rd of 2013, Robert

1 Washington brings along Daryl Warren and Michael Twitty, the
2 other Defendant who's already pled guilty, to meet with Agent
3 Zayas. They again discuss the home invasion robbery. That's
4 video and audio as well.

5 The next day, June 4 of 2013, they meet again, a
6 brief meeting between Mr. Warren, Mr. Washington, and Agent
7 Zayas. Mr. Twitty was not there, and they have a discussion
8 about the pending -- the impending home invasion robbery the
9 next day, set for June 5th of 2013.

10 Then on June 5, Mr. Washington, Mr. Warren, and
11 Mr. Twitty again meet with Agent Zayas on a car wash lot.
12 They discuss the home invasion robbery further and then follow
13 him to the prearranged arrest location. There's video from
14 the car wash lot, and then they follow him to another location
15 on June 5th where there's more discussion, and then shortly
16 after that, the Special Response Team, the SWAT team moves in
17 and arrests everyone there.

18 THE COURT: And the whole thing is video and audioed,
19 including the arrest?

20 MR. STEVENS: Yes.

21 THE COURT: Okay. And have you provided the --
22 whatever transcripts or any other things you're going to use
23 to the defense counsel?

24 MR. STEVENS: Yes, Judge. All of that video was
25 provided, of course, months ago, and then last week, we

1 provided the transcripts of exactly what it is we're going to
2 play.

3 THE COURT: So the exact clips have been provided?

4 MR. STEVENS: Yes.

5 THE COURT: Okay. So any issues with regard to this
6 that we need to discuss before the -- before we start? I mean
7 I -- yeah.

8 MR. LYNCH: Judge, I did want to bring up a couple of
9 issues that relate to the recordings. First, with respect to
10 the Government's transcripts, those exhibits they intend to
11 introduce, if the defense counsel chooses to question or
12 cross-examine on remaining portions of those transcripts, I
13 would ask, just because I'm appointed counsel and I know the
14 Government has their tech wizard, that the Government be
15 required to play what we ask, just so I don't have to try to
16 set up our stuff.

17 THE COURT: Other pieces of the clips?

18 MR. LYNCH: Yeah, if the Court --

19 THE COURT: Have you all discussed this with each
20 other --

21 MR. LYNCH: Kind of.

22 THE COURT: -- because I don't know if they're
23 prepared to do that?

24 MR. STEVENS: I'm not, Judge. I mean, we have the
25 entire disc. I can play -- I can try to play whatever he

1 wants, but I don't have any specific clips that I'm aware he
2 would want.

3 MR. LYNCH: I can provide them to the Government,
4 too. These are some things that I just uncovered, that I
5 would like played in detail, last night.

6 THE COURT: Okay.

7 MR. LYNCH: So --

8 THE COURT: If you can -- if you can -- if you can
9 tell him how to find those on there, on the discs --

10 MR. LYNCH: Yeah, I have them written down exactly
11 what they are, and I'll give you an example. There's a
12 June 5th conversation. I think there are several. On one of
13 the June 5th conversations, there's a video of the undercover
14 officer engaged in conversation with Mr. Washington, Warren,
15 and Twitty, and they're talking about who was going to enter
16 into the residence. The Government's proposed clip stops, I
17 believe, at the 12-minute mark. I would like the additional
18 two minutes played after that up to the 14-minute mark because
19 it adds further context to that conversation, and I can give
20 them exactly. I also have my transcript that, you know, I
21 could also put on the ELMO, just to show what it is as a
22 guide.

23 THE COURT: Okay. So I'd like you to do that.

24 MR. LYNCH: Yeah.

25 THE COURT: Give them the clips you think you want to

1 use and the transcripts, and then I'll ask the Government to
2 find those. I think it's appropriate since the Government's
3 introducing this evidence for the Government to have the
4 evidence available for cross-examination if it's other
5 portions. It's just logistically I'm not exactly sure how to
6 do it, but I think the Government's technician should be
7 prepared to do that, but the defense are going to have to
8 say -- you know, I mean it sounds like you've got times and
9 things. You can't --

10 MR. LYNCH: Yes.

11 THE COURT: It's not going to be just, "Oh, show me
12 that part where he talks about X," right?

13 MR. LYNCH: Exactly, yes.

14 THE COURT: Okay. That sounds good.

15 Mr. Jimerson, anything with you about these, these --

16 MR. LYNCH: Your Honor, I did have one other issue
17 before we get there.

18 THE COURT: Okay. Go ahead.

19 MR. LYNCH: With respect to Mr. Washington's defense,
20 there are other recorded conversations that I'd like the Court
21 to consider, namely, jail calls from the St. Charles County
22 Department of Corrections. At this point, I believe it's our
23 intent to try to introduce three of what I believe to be are
24 eight conversations from June 7th to June 8th of 2013, namely,
25 of Mr. Warren engaged in conversation with a brother, so I

1 would ask the Court just so --

2 THE COURT: Okay. So you want to enter -- so
3 Mr. Washington wants to introduce clips of Mr. Warren's
4 conversations?

5 MR. LYNCH: Yes.

6 THE COURT: And what do they say and why do you want
7 to introduce them?

8 MR. LYNCH: Well, Mr. Warren repeatedly emphasizes
9 that he is responsible for the guns in issue, using specific
10 references to felon in possession of a firearm, possession of
11 a firearm in furtherance, so I think (a) they're admissible
12 and I think they're relevant, and if the Court asks, I can
13 give my reasons for that.

14 THE COURT: And is the Government intending to
15 introduce any of these jail calls?

16 MR. STEVENS: No, Your Honor.

17 THE COURT: Okay. So, Mr. Jimerson.

18 MR. JIMERSON: Thank you, Your Honor. There is one
19 issue that I think in addition that we would want played.
20 Mr. Washington -- Mr. Warren has indicated that, particularly,
21 there is a disc, basically, where there's a third meeting at a
22 car wash, as you spoke about earlier, that talks about he
23 indicates that he's not going, he's not participating, and --
24 and if that's played, we want the complete portion of that
25 played.

1 MR. STEVENS: Yeah, if you just give me the minutes.

2 THE COURT: Yeah, give the count to the Government,
3 and then you can do that in your -- I guess in the
4 cross-examination; is that how we do it? They have to then
5 say, "Oh, I want to play this part," or can you just agree to
6 play it all in yours?

7 MR. STEVENS: Well, no, I think on cross-examination
8 they could do that, Judge, and we could arrange to -- but this
9 agent is -- I mean, he's going to be our first witness, so I
10 would just ask that they get those to us as soon as possible,
11 and then if they want to cross-examine him on other portions
12 of that same conversation, they're certainly entitled to do
13 that.

14 MR. JIMERSON: And here's my problem with it, Judge.
15 When I -- I'm second counsel on this when I came in, and I'm
16 just discovering -- not by, you know, Mr. Stevens, but I'm
17 just discovering that that portion that we're talking about is
18 missing. You know, in fact, Mr. Warren has indicated to me
19 that there's a disc out there with that information on it from
20 the third meeting, you know, that I don't have. I'm not
21 saying it was not --

22 THE COURT: Okay. Well, you all are going to have a
23 couple hours to discuss this. You need to discuss this.

24 MR. JIMERSON: You know, if it's there --

25 MR. STEVENS: No, I know the meeting you're talking

1 about.

2 THE COURT: Okay. Hold on. Not right now. I've
3 got -- but among yourselves, and then you can tell me if you
4 can reach agreement --

5 MR. JIMERSON: Yes, ma'am.

6 THE COURT: -- when I come back. I don't need to
7 hear about it now.

8 MR. JIMERSON: Yes, ma'am.

9 THE COURT: So, Mr. Jimerson, do you have any
10 objection to Mr. Lynch wanting to introduce these clips of the
11 jail conversations?

12 MR. JIMERSON: Not at all.

13 THE COURT: Okay. Okay.

14 MR. STEVENS: May I address that, Judge?

15 MR. JIMERSON: May I come back to that, Judge, before
16 you address it?

17 MR. STEVENS: Yeah.

18 MR. JIMERSON: Okay. I just stated something, Judge,
19 I want to withdraw from. I do have objection to it because --

20 THE COURT: Yeah. He says it's your client saying
21 he's responsible for the guns and all that stuff.

22 MR. JIMERSON: Exactly, and so I -- based on that, I
23 think those are hearsay at best in terms of what's going on,
24 so I do object to him introducing that regarding implicating
25 my client with possession of guns.

1 THE COURT: Mr. Lynch, why aren't they hearsay?

2 MR. LYNCH: Your Honor, first, I think that it's not
3 the traditional method of introducing these. It's not the
4 Government introducing. I think (a) they're not hearsay
5 because their reliability is not an issue. I think it's an
6 admission in one -- I think there are several ways it could be
7 introduced. I think it's a pure admission of guilt by a party
8 who is at the core of the charges in issue. I think also it
9 can be introduced as a statement against interest. If
10 Mr. Warren is present at trial and he doesn't testify, then
11 he's unavailable, and then I can introduce those statements
12 because they go directly to the heart of the two charges in
13 issue, which would be the 924(c) charge and the 922(g) charge
14 as applied against my client. I also -- so I think there's no
15 issue with respect to reliability. I think they come in as a
16 business record. I'm prepared to have the St. Charles County
17 custodian of records testify as to how those phone calls are
18 recorded, obtained, the same thing the Government would do
19 when it introduces it as far as reliability and foundation;
20 however, it's not a pure 801(d)(2)(E) conversation or
21 admission.

22 I would also point out that, Judge, there's nothing
23 to say that those comments are testimonial. I think that's a
24 big issue in light of *Crawford*. I think it's -- United States
25 or *Ohio versus Davis* is the Supreme Court case, and I'll give

1 the Court the case. Just because those phone calls were made
2 and the Defendants, you'll find out, knew that they were being
3 recorded, there's nothing to indicate that they made those
4 statements knowing that they would be testimonial used against
5 them in court. So there's nothing to say that this Court has
6 to find that they're testimonial in the first place that will
7 conjure up confrontation issues. It's not what -- I don't
8 want to be pigeonholed into how the Government introduces
9 those conversations.

10 THE COURT: No, and that -- it is different when
11 you're doing it, and the first big difference is that they
12 are -- you know, they don't fit the admission by a
13 party-opponent exception or definition of nonhearsay. They
14 are hearsay because he's not an opponent to your client. You
15 all are -- this is not being offered by the Government, so --
16 so although the Government might have the ability to introduce
17 those as an admission by Mr. Warren, I don't believe that a
18 Codefendant does, and I don't believe they're made in
19 furtherance of the conspiracy. At least the problem with
20 that -- well, I'd have to make some findings, and the
21 Defendant's not going to make the findings -- the Government's
22 going to -- I mean make the evidence for the *Bell* findings, so
23 that's a bit of a problem, but let me just go back to your
24 hearsay exceptions. I mean -- and I don't think the
25 confrontation clause is an issue because these were not --

1 well, it's just not an issue because it's -- he's here, so --
2 and it's not -- well, let me see. They weren't elicited by
3 law enforcement, but I guess that's a different issue. I
4 don't know. I did not see this one coming, so I apologize.
5 And so do you think they fit an exception of the hearsay
6 because he's not available?

7 MR. LYNCH: Well, I do, Judge. I would also point to
8 the number of Eighth Circuit cases, *United States versus*
9 *Mahasin*, 362 F.3d 1071. I can give you a copy.

10 MR. STEVENS: I have the case.

11 MR. LYNCH: And then a Fourth Circuit case, Judge,
12 which just has the overarching principles when another
13 defendant wants to introduce these things. It's *United States*
14 *versus Jones*, 716 F.3d 851. It's a 2013 case. I would note,
15 Judge, that in the Eighth Circuit, when the Government
16 introduces these things, they're always introduced, and if
17 it's not under 801(d)(2)(E), it's to add context to the rest
18 of the conversations with the defendants or by and between the
19 defendants or by and between the suspects or targets and the
20 officers, so I'd say just to add context, they could be
21 introduced as well, but I think that it's -- I think it's
22 simply a statement against interest, and there's no case law
23 to suggest that I can't or Mr. Washington can't introduce
24 those where the declarant is considered unavailable.

25 THE COURT: Okay. I'll look at these cases over the

1 break, and I'll give you a ruling on this.

2 MR. LYNCH: Can I point out one other case, Judge?

3 THE COURT: Yeah.

4 MR. LYNCH: The only other -- there's a caveat to
5 that, and there's an exception, *United States versus Gordon*,
6 which is also an Eighth Circuit case, and I think that's
7 interesting for this Court because it's distinguishable from
8 this case. Nontestifying codefendants who make statements to
9 agents, those statements are not admissible. That's not what
10 we have here. We have a nontestifying defendant, I'm
11 assuming, that made statements at a -- during a recording at a
12 jail holding facility.

13 THE COURT: Right. He's making these statements to
14 somebody else.

15 MR. LYNCH: Right, but what I'm saying is the case
16 law usually with respect to another defendant trying to
17 introduce a codefendant's statements almost always applies to
18 a nontestifying codefendant making statements to agents --

19 THE COURT: Right.

20 MR. LYNCH: -- and that's where the hearsay issues
21 become, you know, primary. This is not the case in this one.

22 THE COURT: What's the name on that Eighth Circuit
23 case you gave me, the 362 F.3d one?

24 MR. LYNCH: That's *United States versus Mahasin*, and
25 that's M-A-H-A-S-I-N.

1 THE COURT: Okay.

2 MR. STEVENS: Can I be heard on that, Judge?

3 THE COURT: Yeah.

4 MR. STEVENS: *Mahasin*, by the way, regarding context,
5 that was a case in front of Judge Limbaugh Sr. in which the
6 Government played jail phone calls that had the defendant on
7 them. There were also substantial statements made by the
8 person he was talking to, and what the defense objected to
9 there was the statements by the person he was talking to. Of
10 course, Judge Limbaugh let in that conversation. You can't --
11 you know, it doesn't make any sense to put the defendant's
12 statements in and not know what the other person is saying.

13 THE COURT: Right, right.

14 MR. STEVENS: That's what *Mahasin* stands for. As far
15 as providing context with the meetings between the Defendants
16 and the agent, these calls happened two days after everyone's
17 arrested. He's in jail, and he's talking to his brother on
18 the phone. Mr. Lynch was good enough to provide me last week
19 with transcripts of calls on June 7th. Today, he mentioned
20 calls on June 8th. I don't know if he plans to play those or
21 not. I do not have transcripts of them, but I would point
22 out, Judge, in these calls, you have -- and I understand he
23 wants to play the entirety of them. You have -- again, these
24 are the same calls in which Mr. Warren goes on about what kind
25 of time he's looking at, and in some cases, he's incorrect

1 about that, at least initially. He's talking about all kinds
2 of other issues. Importantly, Mr. Lynch mentions that he
3 thinks that this is not hearsay because it's a statement
4 against interest. In large part, these statements are
5 actually exculpatory. What he's saying is "All I'm good for
6 is the felon in possession of a firearm, not any of the rest."
7 They're exculpatory statements, so they're not -- they're
8 not -- they shouldn't come in as --

9 THE COURT: So you oppose their being introduced?

10 MR. STEVENS: I do. I do. I would point out, Judge,
11 well, for that reason. Obviously, for that particular
12 exception, Judge, they need to establish, first, that he's
13 unavailable -- I think we can assume that -- and that the
14 statements are against the declarant's penal interests. In
15 context, they're simply not. He's saying, "Yeah, I'm good for
16 the felon in possession." He says this multiple times to his
17 brother. "I'm good for felon in possession of a firearm. I'm
18 not good for the rest of it." You know, it's either "They led
19 me down the road" or "I wasn't going to do it" or whatever,
20 but they're not -- they're not statements against penal
21 interest. The other thing is that in order for them to come
22 in for that purpose, you have to have corroborating
23 circumstances that clearly suggest the truthfulness of it.
24 What we have here is we -- and I'm not going to play them, but
25 we have taped statements of Mr. Warren and Mr. Washington to

1 the ATF agents, and in those statements, Mr. Washington claims
2 that one of the guns is his, and in Mr. Warren's statement, he
3 claims that the guns belong to the two other coconspirators,
4 so, clearly, we don't have circumstances that corroborate what
5 Mr. Warren is indicating on these calls. In fact, the
6 circumstances are entirely contrary to what Mr. Warren is
7 saying on these calls, so I don't see how these can -- can
8 ever meet the exception for a statement against penal
9 interest. It doesn't meet either of those criteria.

10 I would also point out, Judge, that this is a
11 conspiracy case. So I mean maybe this goes more to why
12 Mr. Lynch wants to play it or whether there would be any
13 prejudice to Mr. Washington if they're not played, but the
14 simple fact of the matter is Mr. Warren admitting that he has
15 the guns in the course of this -- now, he's denying the
16 conspiracy, but him admitting that he has the guns -- if he
17 possessed them in connection with the conspiracy, that means
18 that Mr. -- Mr. Washington is responsible for anything that's
19 clearly foreseeable in the course of this conspiracy, so I
20 don't know that it even does him all that much good.

21 MR. JIMERSON: Judge, I know you're trying to get out
22 of here. If I may just add, basically, first, we don't have
23 reliability of that statement. What guns are we talking
24 about? He gives no description of that. There's anything.
25 Plus we have an outside person who's not a party to this. I

1 think a bigger issue for you as well, Judge, is if we're
2 getting these Defendants to fight each other and say, "You did
3 this" or whatever, I think you may have a question in terms of
4 whether we're going to jointly try this case as well because
5 if we get to that point where Mr. Washington will have to
6 testify and say, "I didn't say that" or some other person
7 saying, "I didn't say that," because he's -- Mr. Washington --
8 I mean Mr. Warren is being called that by Mr. Washington, I
9 think we open up a whole can of worms, Judge, I believe, that
10 may lead to severing this, severing this trial.

11 THE COURT: Okay. Mr. Lynch.

12 MR. LYNCH: Your Honor, I think -- just as far as the
13 conspiracy goes, I think that there are a number of recorded
14 calls by the Government, namely, this ATF vehicle call,
15 recorded conversation on June 5th, 2013, and context becomes
16 hugely important. Contrary to what the Government says,
17 there's more to it than Mr. Washington just saying, "The guns
18 are mine." He did not. He said, "The rifle was mine." He
19 did so during the course of this recorded conversation after
20 he and Daryl Warren and Michael Twitty were engaged in
21 conversation for about 20 minutes where Daryl Warren tells
22 them what guns to take and then Mr. Washington asks him,
23 "Well, what was the gun?" So I think context is hugely
24 important with respect to the facts and circumstances
25 underlying.

1 THE COURT: Which conversation are you talking about?

2 MR. LYNCH: This is now the June 5th, 2013,
3 conversation in the undercover ATF vehicle.

4 THE COURT: Right.

5 MR. LYNCH: And I think that provides context even
6 with respect to the conspiracy because it shows Mr. Warren
7 urging someone else to take the gun off of him because he's
8 worried about the sentence that goes along with that. So it's
9 not that just Mr. Washington made a blatant admission that the
10 gun was his. It's following a sequence of events, and I think
11 that you could even argue that that recorded conversation is
12 part and parcel of the conspiracy, notwithstanding what the
13 Government's understanding of my defense is, and that the
14 subsequent phone calls from the jail are still in furtherance
15 of the conspiracy, and that is what *Mahasin* says because
16 Mahasin's attorney argued that, well, hey, he was in jail
17 after the fact, so how can that be in furtherance of the
18 conspiracy, and the Eighth Circuit said, no, you were talking
19 about the substance of the charges in issue, and that's why
20 it's still part of the conspiracy.

21 THE COURT: Yeah, and I do -- I do recognize that
22 that's -- that that is the law. So are you saying you want to
23 introduce the car's conversation?

24 MR. LYNCH: Yes, and that's what I alluded to earlier
25 in our conversation today, and I think that, you know, the

1 Government -- the agents drafted reports of investigation
2 regarding these conversations. It was a setup with respect to
3 putting them in the car.

4 THE COURT: Okay. So the penalty stuff, we get into
5 the car, but I understand now the Government is not going to
6 introduce the car statements, but, Mr. Stevens, do you have
7 any objection to Mr. Lynch introducing these?

8 MR. STEVENS: Absolutely, Judge. It's the same
9 issues. I mean what he would be putting in if he put in the
10 June 5th conversation, postarrest conversations in the car, is
11 conversations between Washington, Warren, and Twitty. I mean,
12 first of all, you know, he can't put in his own statements.
13 It's self-serving, obviously, and he can't put in his
14 Codefendant's statements. I'm not going to play any of them,
15 and they don't meet any hearsay exception. They're the same
16 issues. What we would end up with here is he said -- you
17 know, there's discussion there about who should take the guns
18 and who shouldn't, and then they have postarrest statements to
19 ATF in which Mr. Washington claims one of the guns, Mr. Warren
20 claims he didn't --

21 THE COURT: Okay. Hold on. Here's what -- here's
22 what I'm going to have to do. Do you all have -- do you have
23 these -- Mr. Lynch, the things you wish to introduce, do you
24 have transcripts of them?

25 MR. LYNCH: I do.

1 THE COURT: All right. So I want you to provide
2 those to me, and I will look at them, but here is my ruling
3 for now. You cannot mention this in opening statement or voir
4 dire.

5 MR. LYNCH: Okay.

6 THE COURT: Or at all until I have reviewed them, and
7 I'm not going to be able to do that until tonight.

8 MR. LYNCH: Okay.

9 THE COURT: So -- so I am precluding you at this
10 point from mentioning these -- anything said in these
11 conversations until I can rule on whether they're admissible,
12 and I will look at the transcripts, or if you want me to
13 listen to the recordings, whatever you want to do, as long as
14 I can access it, I will do that tonight and give you a ruling
15 on that first thing in the morning, but I need to hear what it
16 is, what they say before I can really judge that.

17 MR. LYNCH: And you want the ATF undercover vehicle
18 transcript and recording from June 5th?

19 THE COURT: I want any recordings that you are saying
20 you wish to introduce in your case-in-chief as opposed to the
21 ones that the Government wants to introduce. I don't need the
22 clips that you're asking the Government to do in context for
23 things the Government's already introducing because they're
24 agreeing to do that.

25 MR. LYNCH: Can I ask the Court another question?

1 With respect solely to the ATF undercover vehicle
2 conversation, I don't think that the Defendant has to
3 introduce that in his case-in-chief. I think the Defendant
4 can introduce that --

5 THE COURT: As cross-examination.

6 MR. LYNCH: -- as cross-examination because, as the
7 Government already stated, Mr. Washington --

8 THE COURT: Yeah.

9 MR. LYNCH: -- made statements that the guns are his.

10 THE COURT: Yeah, so I -- so I do want to see that
11 one, too, even though it may be on your cross-examination, and
12 I am assuming that we're going to pick the jury, do opening
13 statements, and start on this ATF witness, and so my
14 anticipation is you will not be cross-examining him until
15 tomorrow, so that's -- you know, I mean I hope we can get some
16 evidence started this afternoon. Okay.

17 MR. LYNCH: Yes, ma'am.

18 MR. STEVENS: Judge, I would point out our first
19 witness, the undercover, didn't do any of these postarrest
20 interviews or anything like that, so I don't think it will
21 even come up then.

22 THE COURT: Yeah.

23 MR. STEVENS: He was not the agent who did it.
24 Frankly, Judge, I don't intend to put in any of the postarrest
25 statements at all.

1 THE COURT: Right.

2 MR. STEVENS: So I'm kind of at a loss for how
3 Mr. Lynch would seek to do that.

4 THE COURT: Well, Mr. Lynch, provide me with and
5 provide it to the other side, too, a copy of what you're
6 providing me, so that they'll know exactly what you provided
7 me, and I will review those transcripts and give you a ruling
8 on that tomorrow morning.

9 MR. LYNCH: Yes, ma'am.

10 THE COURT: Okay. What else do we need to discuss
11 before we begin picking the jury this afternoon? I'll do the
12 standard -- I'll do the voir dire the standard way I usually
13 do, and then I'll give you all an opportunity to ask
14 questions. I will apply my 20-minute presumption to all
15 things, and I will apply it to voir dire. We're not going to
16 have -- I will be watching the clock. The clerk is not going
17 to do you to the second the way we do on closing arguments,
18 but I will do that here. I believe on opening statements also
19 you shouldn't need more than 20 minutes. Again, that will be
20 a less -- you know, it's a less precise clock.

21 MR. LYNCH: That's a gift. I think Mr. Stevens and I
22 got seven minutes the last time we had a trial.

23 MR. STEVENS: I think you're correct.

24 THE COURT: Yeah, I don't think you need 20 minutes,
25 but I don't want you to take more than that, and I don't want

1 you to take more than 20 minutes each on voir dire, and I hope
2 you won't need that, and I'll go in order of everything we do
3 will be Mr. Lynch first and then Mr. Jimerson because that's
4 the way the Defendants are listed on the indictment.

5 MR. STEVENS: And you'll do the standard voir dire
6 before, Judge?

7 THE COURT: I will and I'll do the standard don't
8 check -- you know, don't do any Internet searches, and I'll
9 give the standard introductory instructions that we usually
10 do, setting out -- you know.

11 MR. STEVENS: And how about strikes? How do you want
12 to work strikes with multiple Defendants?

13 THE COURT: Oh, man. When in doubt, look at the
14 rule.

15 MS. BEHRENS: Judge, if you need to go, we can look
16 that up later.

17 THE COURT: Yeah, I'll tell you how we'll do it, but
18 you might as well know now. I don't have it in my note how
19 I -- I'm going to decide how many strikes we'll allow once I
20 see how many jurors we have left after the challenges for
21 cause, et cetera. Even though we had some -- some areas have
22 had weather issues, but not -- most of the people in our --
23 you know, where we get our jurors from didn't have serious
24 weather issues. In fact, our Cape Girardeau courthouse is
25 closed today because they had serious weather issues, but we

1 dodged the bullet, so we will -- I need to see how many people
2 we have left, and I'll decide how to divvy up or whether I'm
3 going to give extra peremptory challenges to the Defendants
4 because they're multiple Defendants because under the rule I
5 may but I do not have to.

6 Okay. And so do provide to the clerk the -- those
7 transcripts and then talk to each other about anything else
8 you need to talk about, and I will see you all at 1:00 p.m.

9 MR. JIMERSON: Yes, ma'am.

10 MR. LYNCH: Yes, Your Honor.

11 MR. STEVENS: Thank you, Judge.

12 (Court recessed from 10:04 a.m. until 1:03 p.m.)

13 THE COURT: All right. Before we bring up the jury,
14 I will tell you a couple things. First of all, I did receive
15 the -- the transcripts of these conversations, and I looked at
16 the couple of cases that you cited, but I thought one of you
17 told me there were some cases about when a defendant is
18 offering this kind of testimony, the jail phone conversations,
19 when a defendant's offering it in a joint trial, and the cases
20 that you cited, it's both -- were both the government offering
21 them, and I wonder if you all have any cases where the
22 defendant did.

23 MR. LYNCH: Your Honor, does that include that Fourth
24 Circuit case?

25 THE COURT: Yeah, the Fourth Circuit case is the

1 one -- the -- okay. The cases you cited me were the *Mahasin*
2 case in the Eighth Circuit. That was the Judge Jackson case.
3 And then the Fourth Circuit case was *Jones*, and in that one,
4 it was the government who -- that was offering the -- they
5 talk about context, but it was the government that offered
6 the -- the statements or the recordings, and I didn't know of
7 any -- you know, I'm still working through this in my head,
8 but I don't see how Mr. Warren can object on confrontation
9 grounds to his own statement because it's -- that's -- he's --
10 it's not another witness, you know. So you have the right to
11 confront the witnesses against you, but he's the witness, so I
12 don't see how he can object on that basis, but I also -- I
13 also need to still look at it some more, and I'm just
14 wondering if you all have any -- any cases where it was not
15 the government that was offering this kind of phone call that
16 was contested.

17 MR. STEVENS: Judge, I have *United States versus*
18 *Berry*. It's an unpublished case, Eleventh Circuit case from
19 November 13 of 2012. Its Westlaw citation is 2012 Westlaw
20 5476922, the Eleventh Circuit, and in that case, one of the
21 defendants sought to introduce the postarrest statement of
22 another defendant and argued, as here, that it was admissible
23 under 804(b)(3) as a statement against interest, and
24 because -- largely because the statement was contrary to other
25 evidence and, therefore, unreliable, they didn't allow it in,

1 which I would argue here as well. As I indicated, the
2 postarrest statements of these Defendants, Mr. Washington
3 claimed that he possessed one of the guns, Mr. Warren claimed
4 that the other two Defendants possessed the guns, and then in
5 the calls that Mr. Lynch wants to play, Mr. Warren is saying
6 that he had at least one of the guns, which, again, doesn't
7 account for the other gun. The other issue with it, as I said
8 before, is that it's not even a statement against interest.
9 When you put it in the context of his entire statement, he's
10 saying, "I'm good only for the felon in possession of a
11 firearm, not the other stuff," so it's not even a statement
12 against penal interest. He's claiming that he's not good for
13 all the other counts but he is for the felon in possession
14 count, so -- but anyway, I think you'll find that *Berry* is on
15 point on that issue.

16 THE COURT: Okay. And then, Mr. Jimerson, Mr. Lynch,
17 do you all have anything to add on that issue? And like I
18 say, I'm not going to decide it until I can have time to look
19 at it all tonight.

20 MR. LYNCH: Your Honor, I don't have anything to add
21 other than what I've already submitted to the Court.

22 THE COURT: Okay.

23 MR. JIMERSON: Nothing further, Your Honor.

24 THE COURT: Okay. I will look at this and let you
25 all know.

1 The two motions that I withheld ruling on with regard
2 to Mr. Washington -- first of all, on the -- and, actually,
3 one of them is Mr. Warren's motion to preclude the Government
4 from eliciting testimony regarding the efficacy of prior sting
5 operations, and -- and the Government says, well, it's not
6 going to do that, but it is going to have this witness testify
7 about "Here's the way we normally conduct this kind of
8 operation, and here's what we usually do, and this is what we
9 usually do and why," and I think that -- I'm not going to
10 allow it. I'm going to grant the motion to that extent
11 because I really do think that the Government should not be
12 allowed to have a witness come up here and say, "This is how
13 we always do it; we've been doing it this way for 20 years;
14 this is -- this is what it is." It's possible that the
15 Defendants' cross-examination might allow them to do that, and
16 so if -- if they -- if there's something the Defendants do in
17 cross-examination that causes the Government to think that on
18 redirect it should be able to go into, you know, this wasn't
19 an unusual thing, then -- then they -- I'm -- I'll be inclined
20 to let them do that or I'll hear about it; I'll have you all
21 talk about it. I don't want the Government to do this,
22 though, without approaching the bench and telling me you
23 believe that the door has somehow been opened, but I think on
24 just the basics of what the Government does in its
25 case-in-chief, setting aside what the Defendants might do on

1 cross-examination, that what is relevant here and probative is
2 what happened in this case, and -- and he can say, you know,
3 why they did things, just like we -- you know, people can say,
4 you know, "I didn't" -- you know, police officers testify
5 every day, "I didn't get fingerprints. I didn't try to test
6 the gun for fingerprints because he had it in his hand when I
7 arrested him, so I knew he had it. I didn't need to find
8 out." They testify as to why things like that. Something
9 analogous to that, he can say what he was doing and why but
10 not "This is how we always do it. We've been doing this for
11 20 years. I'm very experienced. I know how to do this." He
12 can testify when he talks about his background that he's been
13 involved in undercover operations, but there's no reason to
14 talk about "Here's how we usually do it." What is relevant in
15 this case is "Here's what we did in this case. This is what
16 happened in this case," and so that's my ruling, and it is --
17 it is my ruling unless the Government can convince me after
18 cross-examination that I should change it, okay?

19 MR. STEVENS: Yes.

20 THE COURT: And then with regard to the domestic
21 assault on 609 grounds, you know, I looked at some 609 law
22 rules again, and -- and like I said, this is a -- I think it
23 is a close call, but -- let me get the rule in front of me.
24 I'm going to grant the motion to exclude that domestic assault
25 conviction and here's why. I do not believe, having heard all

1 the arguments, that a conviction for domestic assault has very
2 much probative value with regard to the Defendant's
3 truthfulness. I understand the argument that every criminal
4 conviction in every case shows that a defendant, at least at
5 some point in his life, has disregarded the law enough to
6 commit a crime and that, therefore, he may disregard his oath
7 or fears of the penalty in perjury. That's true in every
8 single case that exists, and I understand that argument, but I
9 think when you look at what 609(a)(1)(B) tells me, it says it
10 must be admitted in a criminal case in which the witness is a
11 defendant if the probative value of the evidence outweighs its
12 prejudicial effect to that defendant, and I simply do not
13 believe that the probative value of this evidence outweighs
14 its prejudicial effect. In fact, you know, if you flipped it
15 around the other way, I would say the prejudicial effect
16 outweighs the probative value. I guess it's saying the same
17 thing, but the -- this isn't a typical, you know, 404(b) case
18 where there's other reasons to admit this evidence. Domestic
19 assault does carry with it a great deal of stigma, as it
20 should, and I know that there -- and I think this is what
21 Mr. Lynch has pointed out in his motion -- that there may be
22 people on the jury panel who, once they hear that the
23 Defendant, you know, beat up his girlfriend or committed a
24 domestic -- has a conviction for domestic assault, because
25 that's all they would hear, that would be enough for them to

1 say he's somebody who has convictions for domestic assault;
2 therefore, he's a bad person; therefore, he's probably guilty
3 of this crime, and I think that the likelihood of their doing
4 that is substantial because it's just a hot-button issue for
5 some people, and that issue is totally unrelated to anything
6 else in this case, and it would not be inappropriate if we
7 were going to introduce that, for example, you know, for the
8 Defendant to feel like he needed to voir dire the jury on
9 domestic assault. That's taking us way far afield from
10 anything that's relevant to this case, so I'm sustaining that
11 and agreeing that the domestic assault convictions may not be
12 used to impeach Mr. Washington if he should choose to testify.

13 MR. STEVENS: Judge, if I could, may I --

14 THE COURT: Yeah, go ahead.

15 MR. STEVENS: -- just object to the Court's ruling on
16 the basis that the -- I understand the Court's ruling, but I
17 would argue, as I did, that the probative value outweighs the
18 prejudice in this case given that this Defendant's credibility
19 would certainly be squarely at issue. I would also argue
20 that -- as I mentioned -- that I'm not aware of any cases in
21 which that's -- and I understand the way that appeals work in
22 these cases; they may not simply have been appealed, but I'm
23 just -- I'm objecting to the Court's ruling for the purpose of
24 preserving it.

25 THE COURT: Yeah, I understand that, and the ruling

1 will remain as it is.

2 MR. STEVENS: Thank you.

3 THE COURT: Okay. What else do we need to discuss
4 before we -- oh, do you all know about my "no recross" rule?

5 MR. LYNCH: I do.

6 THE COURT: Yeah, you've been in trial before. So
7 here's what it means, Mr. Jimerson. I do not allow recross as
8 a matter of right. We have direct, cross, redirect. If the
9 proponent of the evidence brings up something new in redirect
10 that wasn't, you know, brought about because of the cross,
11 then you can approach the bench and tell me what you intend
12 to -- what you want to ask and just ask permission to recross,
13 and I -- I will usually ask you what is it exactly you want to
14 ask, and we'll do that at sidebar. Now, there are some times
15 when it's so obvious that I might just say, "Yeah, go ahead,"
16 and I won't require you to do that. Unfortunately, sometimes,
17 when I do that, I find out that the questions that are being
18 asked are not the ones I thought were so obviously new things
19 that were going to be brought up, so that's the "no recross"
20 rule.

21 Okay. Now, what else?

22 MR. STEVENS: Can Mr. Lynch and I approach, Judge?

23 THE COURT: Yeah.

24 MR. JIMERSON: Am I included in this?

25 MR. STEVENS: You can come if you want.

1 MR. JIMERSON: I do want to hear.

2 (A bench conference was held on the record as follows:)

3 THE COURT: Okay. So we're at sidebar with all three
4 lawyers.

5 MR. STEVENS: Yes. Mr. Lynch and I have -- and I
6 know it's awful late, but Mr. Lynch and I have recently, just
7 in the last few minutes, had a discussion about a potential
8 resolution of this case. I think he, obviously, needs some
9 time to talk to his client about it. It's something we really
10 hadn't broached before, and I wonder if we might have 10
11 minutes for him to discuss that with his client.

12 THE COURT: Yeah. I'm trying to think if there was
13 another way to do it, and there's not because once we start
14 picking the jury we've started picking the jury, so, yeah,
15 okay. We'll be in recess for -- I'll give you 15 minutes, but
16 let's try to --

17 MR. LYNCH: Yes. Is there a room in the hallway
18 where they can put him and I can go in?

19 THE COURT: There -- there -- oh, where?

20 MR. LYNCH: For him.

21 THE COURT: You'll have to ask the Marshals.

22 MR. LYNCH: He's kind of loud, so . . .

23 THE COURT: Yeah, you'll have to ask the Marshals.
24 If you stay in the courtroom, all we can do is keep the --

25 MR. LYNCH: White noise on?

1 THE COURT: -- the white noise on, but you could
2 also -- if you want to go back downstairs, I know that would
3 take a little more time.

4 MR. LYNCH: All right.

5 THE COURT: Or if you wanted to, I could tell
6 everybody else to leave the courtroom.

7 MR. LYNCH: Whatever is easiest.

8 MR. STEVENS: We could step out.

9 THE COURT: Why don't you talk to the Marshals.

10 MR. JIMERSON: If I might add, Your Honor, if they
11 resolve their case, I think there's a chance my client may
12 reconsider his going to trial on what's remaining, so I
13 just -- I know --

14 THE COURT: Why don't you all --

15 MR. JIMERSON: I can't say anything yet.

16 THE COURT: No, of course not. Why don't you all
17 talk to your clients, and if you need to go down --

18 MR. LYNCH: I'm just going to take mine down. It
19 will save time.

20 THE COURT: Take them down to the Marshals Service?

21 MR. LYNCH: Yes.

22 THE COURT: Okay. I'll do that. Okay. Sorry. So
23 we're going to be in recess for 30 minutes, and that will give
24 both attorneys time to go downstairs and discuss things with
25 their clients privately.

1 MR. LYNCH: Yes, ma'am.

2 THE COURT: All right. Okay. All right. So that's
3 what we'll do.

4 MR. STEVENS: Thank you, Judge.

5 MR. LYNCH: Thank you.

6 (The following proceedings were held in open court.)

7 THE COURT: Okay. We're going to be in recess for 30
8 minutes, and I would ask that each Defendant, each defense
9 counsel needs to be able to have a private discussion with his
10 lawyer, so 30 minutes will give you time to get them
11 downstairs and back up. All right. Court's in recess for 30
12 minutes until 1:45.

13 (Court recessed from 1:16 p.m. until 1:50 p.m.)

14 (A bench conference was held on the record as follows:)

15 MR. LYNCH: I know you're not going to allow us to
16 have all day to negotiate. We've been negotiating for a
17 while, but I believe the Government has made a substantial
18 offer to the client, and we've had a couple of changes in what
19 that offer's been, and we're very close to maybe having a
20 resolution, so I'm going to need a few more minutes, if you
21 would indulge me. I think it may be worth it because the
22 offer is substantial so -- in my mind.

23 THE COURT: Okay. Well --

24 MR. LYNCH: And I don't want to keep doing this.
25 He's going to know it's my last shot, and then we'll just go.

1 We're all ready, so --

2 THE COURT: Okay. So we'll do that, and just let the
3 clerk know when you're ready. You're going to stay in here, I
4 assume?

5 MR. LYNCH: I would like to go back down.

6 THE COURT: How are you doing, Mr. Jimerson?

7 MR. JIMERSON: Well, Your Honor, I'm -- in light of
8 that, I actually tried to talk to my client. I also talked to
9 Mr. Stevens. I tried to talk -- he gave me some -- some
10 additional offers as well. Okay. It wasn't much, but it was
11 what he could do, and I presented that to my client in light
12 of he may be the only person at trial in this situation, which
13 I don't like him being that only person at trial in this
14 situation, if you will; however, I don't think he's going to
15 change his mind.

16 THE COURT: Right. Okay. That's fine.

17 MR. JIMERSON: But if that is the case where
18 Mr. Washington decides to plead guilty, Judge, I think
19 Mr. Stevens and I also talked about maybe we can start
20 tomorrow in terms of picking the jurors because I think
21 Mr. Stevens may have to redo his evidence and all of that, you
22 know, so I think we may have a logistic problem in terms of
23 everything.

24 THE COURT: Okay. Well, I'm not going to do anything
25 yet. I'll just give you some extra time, and --

1 MR. JIMERSON: Yes, ma'am.

2 THE COURT: -- I don't know. Can -- can you --

3 MR. LYNCH: Do you want a time frame?

4 THE COURT: Yeah.

5 MR. LYNCH: Can I have another half hour, and then
6 I'm done.

7 THE COURT: Yeah.

8 MR. LYNCH: I'll tell him that's it. I'm ready to
9 go.

10 MR. STEVENS: Judge, we've -- we've -- Mr. Lynch came
11 up after talking to his client. We talked more. We're at a
12 bottom line, and either it's going to happen or not.

13 THE COURT: Yeah, so 30 more minutes?

14 MR. LYNCH: Yeah.

15 THE COURT: Okay. And then it looks like we'll
16 probably go to trial on Mr. -- and I'll make a record once
17 we're done with that.

18 MR. JIMERSON: Well, Mr. Stevens, give me another
19 bottom line, and I can --

20 THE COURT: I think it sounds like he's already given
21 you his bottom line.

22 MR. STEVENS: Yeah.

23 MR. LYNCH: Thanks, Judge.

24 MR. JIMERSON: All right. Thanks.

25 (The following proceedings were held in open court.)

1 THE COURT: All right. We will be in recess another
2 30 minutes and -- or until -- actually, until 2:30. At 2:30,
3 we'll move forward one way or another.

4 (Court recessed from 1:53 p.m. until 2:40 p.m.)

5 THE COURT: All right. Mr. Lynch, how are we going
6 to proceed?

7 MR. LYNCH: Judge, it is my understanding that
8 Mr. Washington is prepared to enter a plea.

9 THE COURT: Okay. And are you all prepared to do
10 that right now?

11 MR. STEVENS: Judge, we would need to adjust the Plea
12 Agreement. I would need some time to do that. It shouldn't
13 take long.

14 THE COURT: Is somebody doing that right now?

15 MR. STEVENS: I would have to go up and do that.

16 THE COURT: You couldn't have spent the last half
17 hour being prepared in case this happened? Okay. So -- and
18 what is Mr. Warren's intention?

19 MR. JIMERSON: His intention is to proceed to trial,
20 Your Honor.

21 THE COURT: All right. And were there any additional
22 concessions or agreements offered by the Government during
23 this break that we need to make a record of?

24 MR. JIMERSON: We do, Your Honor. There were some.
25 Mr. Lynch and I -- not Lynch -- Cris and I talked, Mr. Stevens

1 and I talked a couple times. The first concession -- I think
2 the ultimate one -- is basically with the 15 years with a
3 level two, so, basically, not -- he's -- my client, if found
4 guilty, can be found up to level four, even more in terms of
5 his criminal background, but keeping it at a level two keeps
6 it pretty close to 15 years.

7 MR. STEVENS: What we were -- what we were
8 discussing --

9 THE COURT: Yeah, Mr. Stevens, why don't you state --

10 MR. JIMERSON: Yeah.

11 MR. STEVENS: Yes.

12 THE COURT: Because I'm missing something here, so --

13 MR. STEVENS: Sure. Judge, we had discussed
14 previously, as I indicated before, potentially, a 15-year
15 sentence. Mr. Jimerson and I talked today. He asked also
16 if -- if I was willing to offer anything. I told him that I
17 would certainly agree to the two levels off for acceptance of
18 responsibility, which I normally would not do on the day of
19 trial, but that that was the extent at this point of what I
20 was willing to offer Mr. Warren.

21 THE COURT: Well, if -- but -- am I understanding
22 that the Guidelines were going to be higher than 15 years
23 anyway?

24 MR. STEVENS: Yes.

25 THE COURT: And would the two levels off have reduced

1 the sentence that -- I mean if you are agreeing to 15 years --

2 MR. STEVENS: Previously. That was an offer
3 previously that I withdrew.

4 THE COURT: Right.

5 MR. STEVENS: And I would not be willing to do that
6 at this point.

7 THE COURT: Okay. So the 15 years is off the table
8 because it was withdrawn?

9 MR. STEVENS: Yes.

10 THE COURT: But you were willing to, if he did plead
11 guilty, take whatever the Presentence Report shows up for the
12 amount of drugs and whatever else --

13 MR. STEVENS: Yes.

14 THE COURT: -- and then -- but you would agree to the
15 concession of two levels off for acceptance of responsibility?

16 MR. STEVENS: Right. That's about the extent of what
17 I would agree to at this point.

18 THE COURT: Okay. And so, Mr. Jimerson, you then
19 discussed this with your client?

20 MR. JIMERSON: I did discuss it, Your Honor.

21 THE COURT: And he chooses to go to trial?

22 MR. JIMERSON: That's correct, Your Honor.

23 THE COURT: Mr. Warren, did your client -- did your
24 lawyer discuss this issue with you?

25 DEFENDANT WARREN: Yes, ma'am.

1 THE COURT: And is it your decision after hearing
2 these, what the Government's offer was, that you wish to go to
3 trial instead of pleading guilty?

4 DEFENDANT WARREN: Yes, ma'am.

5 THE COURT: Okay. Here's what we'll do. We'll take
6 a short break while the Government goes and gets its paperwork
7 together, and we will not release the jury, of course, and we
8 will probably start picking the jury in the morning, but I
9 can't tell them to go home yet until I -- I mean, we could
10 conceivably keep -- well, we'll just take another recess while
11 the Government goes and does the paperwork. Let me know when
12 you're ready.

13 (Court recessed from 2:43 p.m. until 3:18 p.m.)

14 THE COURT: All right. What I'm doing since Mr. --
15 and I'll note for the record the Defendants are not present,
16 nor is Mr. Lynch nor Mr. Stevens, but Ms. Behrens is here as
17 is -- well, here's Mr. -- Ms. -- is it Aldaddah?

18 MS. ALDADDAH: Yes.

19 THE COURT: Okay. Ms. Aldaddah and Mr. Jimerson. I
20 have just asked the jury clerks to send the citizens who have
21 been waiting downstairs for two and a half hours for you all
22 to get your act together -- to send them home and tell them to
23 be back tomorrow morning at 9:00 a.m. Whatever happens this
24 afternoon, we'll start picking the jury in Mr. Warren's case
25 at 9:00 a.m. If Mr. Washington changes his mind again, we'll,

1 obviously, you know, start picking his -- you know, we'll have
2 him come tomorrow morning, too, but I did not want to make
3 these people sit there anymore waiting because you all
4 couldn't have done this sooner, and I don't know why drafting,
5 making changes to a plea agreement couldn't have been done all
6 this time. When you knew what the offer was, you could have
7 been ready and made minor changes, but in any event,
8 nevertheless, everybody waited until the last minute. So
9 that's what we're going to do. I'm also going to notify the
10 Marshals Service that they can return Mr. Warren to his place
11 of incarceration, and so, Mr. Jimerson, you no longer have to
12 remain. I'll stay -- you know, we'll stay here -- today.

13 Just be back at 9:00 a.m. You're free to stay if you want to.

14 MR. JIMERSON: I appreciate that, Your Honor. I will
15 stay.

16 THE COURT: Okay. But I'm going to tell the Marshals
17 they can go ahead and take your client home, okay?

18 MR. JIMERSON: Yes, ma'am.

19 THE COURT: Or wherever home is.

20 MR. JIMERSON: I've got you.

21 THE COURT: Okay. Court's in recess.

22 (Proceedings concluded at 3:19 p.m.)
23
24
25

CERTIFICATE

I, Gayle D. Madden, Registered Diplomate Reporter and Certified Realtime Reporter, hereby certify that I am a duly appointed Official Court Reporter of the United States District Court for the Eastern District of Missouri.

I further certify that the foregoing is a true and accurate transcript of the proceedings held in the above-entitled case and that said transcript is a true and correct transcription of my stenographic notes.

I further certify that this transcript contains pages 1 through 84 inclusive.

Dated at St. Louis, Missouri, this 5th day of August, 2014.

/s/ Gayle D. Madden

GAYLE D. MADDEN, CSR, RDR, CRR

Official Court Reporter